United States Court of Appeals

for the Second Circuit

APPENDIX

ORIGINAL

74-1498

United States Court of Appeals

For the Second Circuit.

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE and SUSAN LINFANTE,
Plaintiffs-Appellees,

against

L. P. W. REALTY COMPANY, LAWRENCE PAUL WOLF,
Defendants,

GULF OIL CORPORATION,
Defendant-Appellant,

JOSEPH JAMES, INC., and JOSEPH JAMES,
Defendants-Appellees-Appellants.

GULF OIL CORPORATION,
Third Party Plaintiff-Appellant-Appellee,

against

BEAMAN CORPORATION,
Third Party Defendant-Appellant,

and

UNITED PORCELAIN CO., INC.,
Third Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

JOINT APPENDIX.

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UNITED STATES COURT OF APPEALS
FILED
AUG 1 1974
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

THE REPORTER COMPANY, INC., New York, N. Y. 10007—212 732-6978—1974

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT.

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE and SUSAN LINFANTE,

Plaintiffs-Appellees,

against

L. P. W. REALTY COMPANY, LAWRENCE PAUL WOLF,

Defendants,

GULF OIL CORPORATION,

Defendant-Appellant,

JOSEPH JAMES, Inc., and JOSEPH JAMES,

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GULF OIL CORPORATION,

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Third-Party Defendant-Appellant,

and

UNITED PORCELAIN Co., Inc.,

Third-Party Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

Docket Entries.

Date		Proceedings
1967		
Dec.	19	Filed complaint and issued summons
1968		
Jan.	19	Filed deft's (Gulf Oil Corp.) interrogatories to pltffs.
Jan.	19	Filed deft's (Gulf Oil Corp.) Answer & cross-claims.
Jan.	22	Filed summons & return, service as follows: unable to find L.P.W. Realty Corp. & Lawrence Paul Wolf in SDNY Gulf Oil Co. by F. L. Scofield 12-20-67. unable to find Joseph James Inc. & Joseph James in SDNY.
Feb.	9	Filed pltffs' affdvt. & order appointing Thomas J. Byrne to serve summons & complaint on all defts. except Gulf Oil Corp.—Clerk
Apr.	1	Filed Affidavit of service of summons and complaint on Joseph James personally on 3/22/68.
May	1	Filed Notice of Motion *re:* Leave to serve 3rd pty. complt., etc. Ret. 5/14/68.
May	1	Filed Memorandum of law in support of deft. Gulf Oil's motion.
May	3	Filed affdvt. of Thomas J. Byrne of service of summons & complaint on deft. L.P.W. Realty Co. by B. Selwyn 3-20-68.
May	7	Filed affdvt. of substituted service of summons; unable to contact deft. (Lawrence Paul Wolf) (attempt made by Thomas J. Byrne, not a Dep. U. S. Marshal)
May	15	Filed memo endorsed on motion filed 5-1-68. Motion granted on default. So ordered.—Wyatt, J.—mailed notice.
May	21	Filed third party complaint.

Docket Entries

June	4	Filed Answer of defts. L.P.W. Realty Co. and Lawrence Paul Wolf.
June	21	Filed 3rd pty. summons and return, served defts. as follows. Served 3rd. pty. deft. Beaman Corporation on 5-23-68 by Hugh B. Maness, Office Manager, MD of NC. Served 3rd. pty. deft. United Porcelain Company on 6-11-68 by Sal Caso. D of NJ.
June	28	Filed deft's Gulf Oil Corp, Answer to cross complaint.
July	9	Filed 3rd pty deft. (Beaman Corp.) Answer with cross complaint & demand for interrogs.
Sept.	27	Filed plaintiff's interrogs.
Dec.	4	Additional summons issued.
1969		
Jan.	8	Filed Additional summons and service by Joseph James Inc.—Mr. J. Brennan, atty. at the office of Secy of State, N. Y., 162 Washington Ave., Albany, N. Y. on 12-26-68.
Mar.	24	Filed 3rd party deft. Answer of United Porcelain Co. Inc.—demands a jury.
Mar.	26	Filed Memorandum of Law in support of pltffs. motion for permission to serve an amended and supplemental complaint.
Mar.	26	Filed pltffs. Notice of motion, affdvt. amended and supplemental complaint—ret. 4-8-69—Room 506 9:30—to add party pltff.
Mar.	27	Filed pltffs. Interrogs. to deft.
Apr.	7	Filed defts. stipulation the return date of pltffs. motion for permission to serve an amended supplemental complaint now set for April 8, 1969 be adj. to Apr. 22, 1969.
Apr.	10	Filed stip and Order that Robert Hill Nix, 54 Mineola Blvd. Mineola, N. Y. be substituted in place of McLaughlin Fiscella & Biancheri for deft. and third party pltff. Gulf Oil Corp.—so ordered—Clerk.

Docket Entries

Apr.	17	Filed stip and Order time for deft. to appear or answer to complaint is ext. to 4-29-69—so ordered—Tyler, J.
Apr.	22	Filed Memo end. on motion filed March 26, 1969—There being no opposition to this motion, it is therefore granted on default. Settle order on notice—Pollack, J.
May	1	Filed stip and Order—time for deft. to appear answer the complaint is ext. to 5-29-69—so ordered—Clerk.
May	22	Filed Notice of Settlement and Order—motion is in all respects granted. The pltffs. are hereby granted leave to serve the proposed amended supplemental complaint attached to the motion papers upon the attys. for the defts. within 20 days from the date hereof. Ordered that the defts. have 20 days from the date of service of such amended and supplemental complaint to serve an answer to the same. Ordered that the deft. Gulf Oil Corp. be designation as Gulf Oil Corporation.—Pollack, J. mn
May	28	Filed pltffs. Amended and supplemental complaint.
May	28	Filed Beaman Corp Answers to interrogs.
May	29	Filed letter from Schaffner and D'Onofrio and papers attached.
July	14	Filed defts. Verified Answer and Cross Claim.
July	23	Filed pltffs' interrogs.
Aug.	14	Filed Deft. United Porcelain Co., Inc. answers Supplemental Complaint and demand for bill of particulars from pltff.
May	3	Filed deft. & 3rd pty pltff's (Gulf Oil) Answer to amended & supplemental complaint.

Docket Entries

1970

Apr.	7	Filed pltffs' cross notice to take testimony.
Apr.	8	Filed deft Gulf Oil Corp. notice to take deposition of deft James Jones on 4-16-70.
May	18	Filed defts' Joseph James Inc. & Joseph James Answer to amended complaint of pltff.
May	21	Filed Plaintiffs' Answers to interrogs. of deft. Gulf Oil Corp.
May	21	Filed Plaintiffs' Answers to interrogs. of defts. Joseph James and Joseph James, Inc.
July	1	Filed pltffs' supplemental interrogs. to defts' Joseph James Inc. & Joseph James.
July	7	Filed Pltff's affdvt & notice of motion to strike answer (Interrogs) returnable on 7-16-70.
July	7	Filed Pltff's memorandum in support of motion filed this day.
July	7	Filed Pltff's notice to take deposition of Gerald Sadowsky on 7-14-70.
July	7	Filed Pltff's Answers to the additional interrogs of defts Joseph James and Joseph James, Inc.
July	13	Filed order that pltff shall file note of issue within 120 days or action shall be dismissed—Sugarman, Ch. J., m/n
July	13	On call for review—G. R.
July	24	Filed memo endorsed on motion filed 7-7-70—Motion is granted on consent as to defts. L.P.W. Realty Co. & Lawrence Paul Wolf & is adj, as to defts' Joseph James & Joseph James Inc. to July 23-70—Submit order—Croake, J.

Docket Entries

July	24	Filed order that defts. LPW Realty Co. & Lawrence Paul Wolf shall serve responsive answers to all of interrogs. of pltffs' by 10-1-70 & ordered that same defts' shall appear for deposition at offices of Berman & Frost prior to 10-1-70 & it is ordered that upon failure of said defts' to answer interrogs., or to appear for deposition, that answer of said defts' are stricken out & judgment as by default be rendered in pltffs' favor against these defts' for relief demanded in pltffs' complaint upon an affdvt. of non-compliance—Croake, J. m/n
Aug.	5	Filed defts' Joseph James Inc. & Joseph James answers to interrogatories of pltff.
Aug.	5	Filed defts' Joseph James Inc. & Joseph James answers to pltffs' supplemental inter.
Aug.	6	Filed 2nd memo endorsed on motion filed 7-7-70—Motion withdrawn—So ordered—Cooper, J.
Oct.	19	Filed pltffs' affdvt & notice of motion to strike answer of defts' L.P.W. Realty Co. & Lawrence Paul Wolf ret. 10-22-70.
Oct.	19	Filed pltff's memorandum of law in support of its motion.
Oct.	21	Filed stipulation that defts' LPW Realty Co. & Lawrence Wolf appear for deposition on 10-27-70 & motion therefore by pltffs' to strike answer is adj. to 10-29-70.
Oct.	29	Filed memo endorsed on motion filed 10-19-70 —Motion withdrawn in accordance with stip submitted & signed this day—So ordered—Mansfield, J.
Oct.	29	Filed stip & order that motion of pltffs' to strike answer of LPW Realty Co. & Lawrence Paul Wolf & for default Judg. ret. on 10-29-70 is withdrawn—So ordered—Mansfield

Docket Entries

Nov.	2	Filed pltffs' Note of Issue & statement of readiness.
Nov.	23	Filed order pursuant to Cal. Rules 6 & 13—Sugarman, Ch. J.
Nov.	30	Filed third party deft's designation of trial counsel.
Dec.	1	Filed pltffs' designation of trial counsel.
Dec.	1	Filed deft & third party pltff designation of trial counsel.
Dec.	2	Filed defts' L.P.W. Realty Co. & Lawrence Paul Wolf designation of trial counsel.
Dec.	11	Filed defts' Joseph James, Inc. & Joseph James designation of trial counsel.

1971

Mar.	1	Filed deft & 3rd party pltff Gulf Oil Corp. designation of trial counsel.
Mar.	11	Filed pltffs' supplemental pre trial memorandum.
Mar.	24	Filed 3rd party deft United Porcelain Co. designation of trial counsel.
July	19	Filed deft-3rd pty. pltff Gulf Oil Corp. affdvt & notice of motion to substitute atty. ret. 7-27-71.
July	28	Filed memo endorsed on motion filed 7-19-71—Motion marked off for non appearance—So ordered—Lasker, J. m/n.
Aug.	17	Filed deft-3rd pty. pltff's affdvt & notice of motion to substitute atty ret. 8-31-71.
Aug.	31	Filed memo endorsed on motion filed 8-17-71—Motion granted on default—So ordered—Wyatt, J.
Sept.	21	Filed Order that deft's motion is granted in all respects & it is ordered that Furey, Mooney & Hengeveld be substituted as attys. of record for deft-3rd pty. pltff Gulf Oil Corp.—Wyatt, J.

Docket Entries

Oct.	22	Filed pltffs' supplemental pre trial memorandum.
Dec.	14	Filed deft-3rd pty. pltff Gulf Oil Corp. pre trial memorandum.
Dec.	14	Filed 3rd pty. deft United Porcelain Co. pre trial memorandum.
Dec.	14	Filed deft L.P.W. Realty Co. pre trial memorandum.
Dec.	14	Filed pltffs' pre trial memorandum.
Dec.	14	Filed defts' Joseph James Inc. & Joseph James pre trial memorandum.
Dec.	14	Filed 3rd pty. deft Beaman Corp. pre trial memorandum.
Dec.	14	Filed Consent Pre Trial Order—Pierce, J.
1972		
Feb.	22	Filed pltffs' supplemental answers to interrogatories.
1973		
May	1	Filed letter addressed to Clerk, dated 4/27/73; advising assignment as Trial Counsel for Third Party deft. by Nicholas A. D'Onofrio.
July	5	Filed pltfs. supplemental pre-trial memo.
July	31	Filed deft's (J. James, Inc. & J. James) will move at time of trial to amend the pre-trial order.
July	31	Filed pltff's supplemental pre-trial memoranda. (Filed 7-16-73).
Aug.	13	Filed stip & order that A. Allen Stanger is substituted for deft's Joseph James & Joseph James. Ward, J.

1974

Feb.	7	Before Knapp, J. Jury trial begun.
Feb.	8	Trial continued.
Feb.	13	" "
Feb.	14	" "
Feb.	19	" "
Feb.	20	" " & concluded. Jury verdict for pltffs.
Mar.	14	Filed deft's & 3rd. pty. pltff's memorandum *Re:* attys fees.
Mar.	14	Filed Memorandum: Judgment is entered without prejudice to the pending motions for judgment notwithstanding the verdict. So ordered. Knapp, J.
Mar.	14	Filed Judgment #74,269: Ordered that pltff. James V. McLean recover of the deft. Gulf Oil Corp., The sum of $50,000.00 dollars, together, with interest rate making a total of $50,106.76. Pltff. Ethel McLean, Recover of deft. Gulf Oil Corp. the total sum of $6,012.87. Pltff. Joseph Linfante recover of the deft. Gulf Oil Corp. the sum of $30,064.09. Pltff. Susan Linfante recover of deft. Gulf Oil Corp., the total sum of $4,008.58. As to deft's L.P.W. Realty Co. & Joseph James, the pltff's take nothing, action be dismissed to them, Deft. & 3rd pty pltff. Gulf Oil Corp. recover in full of the 3rd pty. deft. Beaman Corp. the amounts paid by it to pltff. James V. McLean, & Ethel McLean, Joseph Linfante & Susan Linfante. Deft. & 3rd pty. pltff. Gulf Oil Corp. recover of 3rd. pty deft. Beaman Corp. 35% of the sum paid to the pltff's. Deft. & 3rd. pty pltff, Gulf Oil Corp. recover of 3rd. pty. deft. United Porcelain Co. 30% of the sum paid to the pltff's. 3rd. pty. pltff. Gulf Oil

		Corp. recover against Beaman Corp. in the amount of reasonable attys fees to be assessed after a hearing. Knapp, J. Judgment Ent. Clerk. Mailed notice. Ent. 3-15-74.
Mar.	25	Filed Bill of costs on Judgment #74,269 in the sum of $487.94. No appearance in opposition. Clerk.
Apr.	5	Filed Notice of appeal by 3rd. pty. deft. Beaman Corp. to the U.S.C.A. from final judgment entered. 3-14-74. Mailed copies, Berman & Frost, Furey & Nooney, L. Louis Winokur, A. Allan, Stanger & Alexander, Ash, Schwartz & Cohen.
Apr.	24	Filed deft's & 3rd. pty. pltff (Gulf Oil Corp.) notice of appeal, to the U.S.C.A. from final judgment entered. 3-15-74. Mailed copies to Berman & Frost, L. Louis Winokur, A. Allen, Stanger, Alexander, Ash, Schwartz & Cohen & John P. Connors.
Apr.	29	Filed deft's Joseph James, Inc. notice of appeal to the USCA, from the final judgment entered 3-14-74. Mailed copies to Fury & Mooney, Berman & Frost, L. Louis Winokur, Alexander, Ash Schwartz & Cohen, John P. Connors.
May	6	Filed Notice to take deposition submitted by deft.
May	6	Filed Notice of Motion by atty for United Porcelain Co.
May	6	Filed Affidavit of L. H. Haut, dated 3-29-74.
May	6	Filed Affirmation in Opposition by J. M. Furey, dated 3-11-74.
May	6	Filed Affidavit in Opposition by J. N. Furey, dated 3-15-74.
May	8	Filed Notice of Cross Motion by atty for 3rd pty deft. Berman C.

Docket Entries

May	8	Filed memorandum & Order that United Porcelain's motion for judgment notwithstanding the verdict is accordingly granted & the claim-over is dismissed. Beaman has also made a motion that Gulf's complaint against it be dismissed. Beaman's motion is denied. So Ordered. Knapp, J. (m/n).
May	8	Filed supplemental Memorandum: The court having previously disposed of motions by Beaman & United Porcelain, the motion of Gulf to set the verdict aside on the ground the case was inconsistent with the pre-trial order is denied for the reasons indicated. So ordered. Knapp, J. m/n.
June	6	Filed 3rd. pty. deft's Beaman Corp. notice of appeal from the amended judgment entered. Mailed copies to Berman & Frost, Furey & Mooney, L. Louis Winokur, A. Allen Stangler & Alexander, Ash, Schwartz & Cohen.
May	30	Filed transcript of record of proceedings dated Feb. 7, 8, 13, 14, 19 & 20-74.

Summons.

UNITED STATES DISTRICT COURT

FOR THE

SOUTHERN DISTRICT OF NEW YORK.

JAMES V. McLEAN and JOSEPH LINFANTE,

Plaintiffs,

vs.

L. P. W. REALTY COMPANY, LAWRENCE PAUL WOLF, GULF OIL CORP., JOSEPH JAMES, Inc., and JOSEPH JAMES,

Defendants.

Civil Action File No. 4959

To the above named Defendants:

You are hereby summoned and required to serve upon Emile Z. Berman and A. Harold Frost, Esqs. plaintiffs' attorneys, whose address is 100 William Street, New York, New York 10038 an answer to the complaint which is herewith served upon you, within days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Date: Dec. 19 1967

JOHN J. OLEAR, JR.
Clerk of Court.
E. SWANCIGER
Deputy Clerk.
[Seal of Court]

Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FOR A FIRST CLAIM ON BEHALF OF PLAINTIFF JAMES V. MCLEAN

FIRST: That at all times hereinafter mentioned, plaintiffs were and still are residents and citizens of the State of New Jersey.

SECOND: Upon information and belief, at all times hereinafter mentioned, defendant L.P.W. Realty Company was a New York corporation with its principal place of business in the State of New York.

THIRD: Upon information and belief, at all times hereinafter mentioned, defendant Lawrence Paul Wolf was a resident and citizen of the State of New York.

FOURTH: Upon information and belief, at all times hereinafter mentioned, defendant Gulf Oil Corp. was and still is a Pennsylvania corporation with its principal place of business in the State of Pennsylvania.

FIFTH: That upon information and belief, at all times hereinafter mentioned, defendant Joseph James, Inc., was and still is a New York corporation with its principal place of business in the State of New York.

SIXTH: That upon information and belief, at all times hereinafter mentioned, defendant Joseph James was and still is a resident and citizen of the State of New York.

SEVENTH: That upon information and belief, at all times hereinafter mentioned, defendant L.P.W. Realty Company was a corporation organized under and with its principal place of business in a State other than the State of New Jersey.

EIGHTH: That upon information and belief, at all times hereinafter mentioned, defendant Gulf Oil Corp., was a corporation organized and with its principal place of business in a State other than the State of New Jersey.

NINTH: That upon information and belief, at all times hereinafter mentioned, defendant Joseph James, Inc., was a corporation organized and with its principal place of business in a State other than the State of New Jersey.

TENTH: Upon information and belief, at all times hereinafter mentioned, defendant Lawrence Paul Wolf was a citizen of a State other than the State of New Jersey.

ELEVENTH: Upon information and belief, at all times hereinafter mentioned, defendant Joseph James was a citizen of a State other than the State of New Jersey.

TWELFTH: Upon information and belief, at all times hereinafter mentioned, defendant L. P. W. Realty Company owned certain premises known as 2153 Eighth Avenue in the City, County and State of New York.

THIRTEENTH: Upon information and belief, at all times hereinafter mentioned, defendant Lawrence Paul Wolf owned premises known as 2153 Eighth Avenue in the City, County and State of New York.

FOURTEENTH: Upon information and belief, at all times hereinafter mentioned, defendant Gulf Oil Corp. was a lessee of premises number 2153 Eighth Avenue in the City, County and State of New York.

FIFTEENTH: Upon information and belief, at all times hereinafter mentioned, defendant Joseph James, Inc. was a lessee of premises number 2153 Eighth Avenue in the City, County and State of New York.

SIXTEENTH: Upon information and belief, at all times hereinafter mentioned, defendant Joseph James was a lessee of premises number 2153 Eighth Avenue in the City, County and State of New York.

SEVENTEENTH: Upon information and belief, at all times hereinafter mentioned, defendants managed, operated, maintained and controlled premises number 2153 Eighth Avenue in the City, County and State of New York.

EIGHTEEN: That on the 28th day of June, 1966 the plaintiffs herein were lawfully upon the said premises 2153 Eighth Avenue in the City, County and State of New York.

NINETEEN: That on the 28th day of June, 1966 the defendants herein were business visitors in the aforesaid premises 2153 Eighth Avenue in the City, County and State of New York.

TWENTY: That on the 28th day of June, 1966 while the plaintiffs herein were lawfully in the said premises 2153 Eighth Avenue in the City, County and State of New York, they were caused to be precipitated by reason of the carelessness and negligence of the defendants in carelessly and negligently managing, operating, maintaining, controlling and owning the aforesaid premises and being otherwise negligent and careless in other respects.

TWENTY-ONE: That by reason of the said occurrence, the plaintiff James V. McLean sustained devastating injuries to his body; he suffered and continues to suffer great pain and mental anguish as a consequence of said injuries; he required, and upon information and belief continues to require medical aid and attention as a result of said injuries; he became obligated for and continues to become obligated for large sums on account of his said injuries; he was prevented from pursuing his normal avocation; and he was otherwise damaged.

TWENTY-TWO: That by reason of the foregoing the plaintiff, James V. McLean claims damages in the sum of Three Hundred Seventy-Five Thousand Dollars ($375,000).

AS AND FOR A SECOND CLAIM AND A FIRST CLAIM ON BEHALF OF PLAINTIFF, JOSEPH LINFANTE.

TWENTY-THREE: That by reason of the said occurrence the plaintiff, Joseph Linfante sustained devastating injuries to his body; he suffered and continues to suffer great pain as a consequence of said injuries; he required, and upon and belief, continues to require medical aid and attention; he was prevented from pursuing his normal avocation; he became obligated for and continues to become obligated for large sums on account of his said injuries; and he was otherwise damaged.

TWENTY-FOUR: That by reason of the foregoing, the plaintiff, Joseph Linfante claims damages in the sum of Two Hundred and Fifty Thousand Dollars ($250,000).

WHEREFORE, plaintiff James V. McLean demands judgment against defendants in the sum of Three Hundred and Seventy-Five Thousand Dollars ($375,000) on the first claim, and plaintiff, Joseph Linfante demands judgment against defendants in the sum of Two Hundred and Fifty Thousand Dollars ($250,000) on the second claim and the first claim on behalf of the plaintiff Joseph Linfante, all together with the costs and disbursements of this action.

EMILE Z. BERMAN and A. HAROLD FROST
Attorneys for Plaintiff
By: A. Harold Frost
Member of the Firm
Office & P. O. Address
100 William Street
New York, New York 10038

Answer of Defendant Gulf Oil Corporation.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., answering the complaint upon information and belief,

ANSWERING A FIRST CLAIM ON BEHALF OF PLAINTIFF JAMES V. MCLEAN

FIRST: The defendant is without knowledge or information sufficient to form a belief as to the truth of averments contained in the paragraphs of the complaint numbered "First", "Second', "Third", "Fifth", "Sixth", "Seventh", "Ninth", "Tenth", "Eleventh", "Twelfth", "Thirteenth" and "Eighteenth".

SECOND: Denies all the averments contained in the paragraphs of the complaint numbered "Seventeenth", "Twentieth", "Twenty-first" and "Twenty-second".

THIRD: Denies all the averments contained in the paragraph of the complaint numbered "Nineteenth" and the defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraph of the complaint numbered "Nineteenth" as to whether the plaintiffs herein were business visitors at the premises mentioned in the complaint.

ANSWERING A SECOND CLAIM AND A FIRST CLAIM ON BEHALF OF PLAINTIFF JOSEPH LINFANTE

FOURTH: Denies all the averments contained in the paragraphs of the complaint numbered "Twenty-third" and "Twenty-fourth".

Answer of Defendant Gulf Oil Corporation

AS AND FOR A SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE CAUSE AND/OR CAUSES OF ACTION, IF ANY, AS STATED IN THE COMPLAINT ON BEHALF OF THE PLAINTIFFS, THIS DEFENDANT, GULF OIL CORPORATION SUED HEREIN AS GULF OIL CORP., ALLEGES UPON INFORMATION AND BELIEF:

FIFTH: That if the plaintiffs suffered any injuries or damages as a result of the matters set forth in the complaint which is denied, such injuries or damages were not caused or contributed to in any manner by this defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., but were caused in whole or in part by the plaintiffs' own negligence, carelessness and/or fault.

AS AND FOR A FIRST CROSS COMPLAINT AND AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANTS, JOSEPH JAMES, INC. AND JOSEPH JAMES, THIS DEFENDANT, GULF OIL CORPORATION SUED HEREIN AS GULF OIL CORP., HEREINAFTER REFERRED TO AS GULF, DEMANDS THAT THE ULTIMATE RIGHTS OF THIS DEFENDANT, GULF, AND JOSEPH JAMES, INC. AND JOSEPH JAMES, CO-DEFENDANTS IN THIS ACTION, AS BETWEEN THEMSELVES BE DETERMINED IN THIS ACTION, AND ALLEGES UPON INFORMATION AD BELIEF:

SIXTH: That pursuant to a lease entered into by and between the defendants, Joseph James, Inc. and/or Joseph James, prior to June 28, 1966, the defendants, Joseph James, Inc. and/or Joseph James, were and are the lessee of a certain gasoline service station located at 301 West 116th Street, also known as 2153 8th Avenue, in the City of New York, New York, which station was at all the times hereinafter mentioned under the exclusive control of the defendants, Joseph James, Inc. and/or Joseph James.

SEVENTH: That when the aforesaid lease was entered into by and between the parties thereto as described above,

the defendants, Joseph James Inc. and/or Joseph James represented and covenanted to this defendant, Gulf, that the defendants, Joseph James Inc. and/or Joseph James, the lessee, would keep the premises, buildings, equipment, fixtures, sidewalks, approaches and driveways in good condition neat and clean, properly lighted, properly equipped, and in a good safe and proper condition.

EIGHTH: That at all the times mentioned in the complaint and at all the times hereinafter mentioned, and more particularly on or about June 28, 1966, the defendants Joseph James Inc. and/or Joseph James, used and occupied the aforesaid premises pursuant to the aforesaid lease as lessee of this defendant, Gulf.

NINTH: That the defendants, Joseph James in and/or Joseph James, in the aforementioned lease made representations, warranties, and covenants, one of which recites as follows:

> "Lessee agrees to exonerate, save harmless, protect and indemnify lessor from any and all losses, damages, claims, suits or actions, judgments and costs which may arise or grow out of any injury to or death of any person or persons or damage to any property caused by or in any manner connected with the use, possession, repair or condition of said premises or any equipment or fixtures thereon."

TENTH: That this defendant, Gulf, had performed any and all obligations undertaken by them in the aforesaid lease, and are entitled to all of the representations, warranties, covenants and hold harmless clauses accruing to their benefit from the aforesaid lease.

ELEVENTH: That at all the times referred to in the complaint and at all the times hereinafter mentioned, and

more particularly on or about June 28, 1966, the aforesaid lease with all of the covenants, warranties, representations, and hold harmless clauses therein was in full force and effect.

TWELFTH: That if the plaintiffs, James V. McLean and/or Joseph Linfante, were caused to sustain certain personal injuries, and if certain damages were sustained at the time and place mentioned in the complaint and in the manner and amount alleged in the complaint through any carelessness, recklessness and negligence other than the carelessness, recklessness and negligence of the plaintiffs, James V. McLean and Joseph Linfante, said injuries and damages were caused by reason of the violation of the terms and conditions of the aforesaid lease and also by breach of the aforesaid covenants by the defendants, Joseph James, Inc. and/or Joseph James, their agents, servants and/or employees, and by virtue of the aforesaid agreement to save harmless and indemnify this defendant, Gulf, if any judgment is recovered herein by the plaintiffs against this defendant, Gulf, it will be damaged thereby, and the defendant, Joseph James, Inc. and/or Joseph James, are or will be primarily responsible therefor.

THIRTEENTH: That by reason of the foregoing, the defendants, Joseph James Inc. and/or Joseph James, will be liable to this defendant, Gulf, and bound to pay to this defendant, Gulf, in the event of a recovery herein by the plaintiffs against this defendant, Gulf, the amount of any such recovery as well as any and all attorneys fees and costs of investigations and disbursements.

Answer of Defendant Gulf Oil Corporation

AS AND FOR A SECOND CROSS COMPLAINT AND AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANTS, JOSEPH JAMES, INC. AND JOSEPH JAMES, THIS DEFENDANT, GULF OIL CORPORATION SUED HEREIN AS GULF OIL CORP., HEREINAFTER REFERRED TO AS GULF, DEMANDS THAT THE ULTIMATE RIGHTS OF THIS DEFENDANT, GULF, AND JOSEPH JAMES, INC. AND JOSEPH JAMES, CO-DEFENDANTS IN THIS ACTION, AS BETWEEN THEMSELVES BE DETERMINED IN THIS ACTION, AND ALLEGES UPON INFORMATION AD BELIEF:

FOURTEENTH: This defendant, Gulf, repeats, reiterates and realleges each and every allegation contained in paragraphs numbered "Sixth" through "Thirteenth" inclusive of the first cross complaint with the same force and effect as if herein set forth at length.

FIFTEENTH: That at all the times referred to in the complaint and at all the times hereinafter mentioned, the aforesaid gasoline service station was under the exclusive control, charge, operation, supervision and management of the defendants, Joseph James, Inc. and/or Joseph James, their agents, servants and/or employees.

SIXTEENTH: That at all the times referred to in the complaint and at all the times hereinafter mentioned, it was the duty of the defendants, Joseph James, Inc. and/or Joseph James, their agents, servants, and/or employees to keep the said gasoline service station in good repair and in a proper and safe condition.

SEVENTEENTH: That the plaintiffs allege that on the 28th day of June, 1966 while the plaintiffs were lawfully on the aforesaid premises, they were caused to be precipitated by reason of the carelessness and negligence of the defendants.

EIGHTEENTH: That said occurrence was due to the carelessness and negligence of the defendants, Joseph James, Inc. and/or Joseph James, their agents, servants

and/or employees in the control, operation, charge, supervision and management of the aforesaid gasoline service station, of which the defendants Joseph James, Inc. and/or Joseph James, had due notice, and through no fault or lack of care on the part of this defendant, Gulf.

NINETEENTH: That if the plaintiffs, James V. McLean and/or Joseph Linfante, were caused to sustain certain personal injuries, and if certain damages were sustained at the time and place mentioned in the complaint and in the manner and amount alleged in the complaint through any carelessness, recklessness and negligence other than the carelessness, recklessness and negligence of the plaintiffs, James V. McLean and Joseph Linfante, said injuries and damages were caused by reason of the sole, active and primary carelessness, recklessness and negligence and/or affirmative acts or omission or commission by the defendants, Joseph James, Inc. and/or Joseph James, their agents, servants and/or employees, and if any judgment is recovered herein by the plaintiffs against this defendant, Gulf, it will be damaged thereby, and the defendants, Joseph James, Inc. and/or Joseph James, are or will be primarily responsible therefor.

TWENTIETH: That by reason of the foregoing, the defendants, Joseph James, Inc. and/or Joseph James will be liable to this defendant, Gulf, and bound to indemnify this defendant, Gulf, in the event of a recovery herein by the plaintiffs against this defendant, Gulf, and bound to pay to this defendant, Gulf, the amount of any such recovery as well as any and all attorneys fees and costs of investigations and disbursements.

WHEREFORE, the defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., demands judgment dismissing the complaint herein as to it with costs and further demands, pursuant to Section 3019 (b) of the Civil Practice Law and Rules of the State of New York, that the ultimate

rights of this defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., and Joseph James, Inc. and/or Joseph James, co-defendants in this action as between themselves be determined in this action and that the defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., have judgment over and against the defendants, Joseph James, Inc. and/or Joseph James, for the amount of any verdict or judgment which may be obtained herein by the plaintiffs against this defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp. together with the costs and disbursements of this action.

McLAUGHLIN, FISCELLA & BIANCHERI
By
A member of the firm
Attorneys for Defendant
Gulf Oil Corporation sued herein as
Gulf Oil Corp.
Office & P. O. Address
80 John Street
New York 38, New York
DIgby 4-7000

Answer and Cross-Claim of Defendant Joseph James, Inc. and Joseph James.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendants, Joseph James, Inc. and Joseph James, by the undersigned attorney, answering the complaint of the plaintiffs herein allege upon information and belief.

FIRST: Deny any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the complaint designated as follows: "First", "Third", "Fourth", "Seventh", "Eighth", "Tenth" and "Eleventh".

SECOND: Deny each and every allegation in the paragraphs of the complaint designated as follows: "Thirteenth", "Sixteenth", "Seventeenth", "Eighteenth", "Nineteenth", "Twentieth", "Twenty-first", "Twenty-second", "Twenty-third", and "Twenty-fourth".

THIRD: Deny each and every allegation in the paragraph of the complaint designated as follows: "Fifteenth" except admits at the time mentioned in the complaint, defendant Joseph James, Inc. was a sub-franchisee operating at premises number 2153 Eigth Avenue in the City, County and State of New York.

AS AND FOR A FIRST, COMPLETE AFFIRMATIVE DEFENSE TO THE ENTIRE ACTION HEREIN:

FOURTH: If the plaintiff sustained any injuries at the time and place alleged in the complaint then said injuries were caused by reason of the negligence of plaintiff contributing thereto.

Answer and Cross-Claim of Defendant Joseph James, Inc. and Joseph James

AS AND FOR A SECOND COMPLETE AFFIRMATIVE DEFENSE TO THE ENTIRE ACTION HEREIN:

FIFTH: Upon information and belief, plaintiff herein, for a good and valuable consideration did execute and deliver to Gulf Oil Corp. a general release by which said release plaintiff did forever remise, remit and release defendant an alleged tort feasor from any and all claims, causes of action and suits arising out of the accident allegedly occurring on June 19, 1966, thereby releasing these answering defendants.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE DEFENSE TO THE ENTIRE ACTION HEREIN:

SIXTH: The court lacks jurisdiction over the person of the defendants, Joseph James, Inc. and Joseph James in that said defendants have never been properly served with the summons and complaint herein and defendants do not waive defense by its appearance herein.

FOR A SEPARATE AND COMPLETE DEFENSE TO THE ENTIRE COMPLAINT HEREIN AND AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANT GULF OIL CORP. THE DEFENDANT JOSEPH JAMES, INC. PURSUANT TO THE CPLR DEMANDS THAT THE ULTIMATE RIGHTS OF THE DEFENDANT JOSEPH JAMES, INC. BE DETERMINED IN THIS ACTION, AND AS AND FOR A CROSS-CLAIM AGAINST THE DEFEDANT GULF OIL CORP. THE DFEENDANT JOSEPH JAMES, INC. RESPECTFULLYY ALLEGES:

SEVENTH: That if the plaintiff(s) were caused to sustain damages at the time and place set forth in the plaintiff(s) complaint through any carelesness, recklessness, negligence other than the plaintiff(s) own carelessness, recklessness and negligence, said damages were sustained by reason of the sole active and primary care-

lessness, recklessness and negligence and/or affirmative acts of omission or commission by the defendant(s) Gulf Oil Corp. its agents, servants and/or employees; and if any judgment is recovered herein by the plaintiff(s) against the defendant(s) Joseph James, Inc. it will be damaged thereby and the defendant(s) Gulf Oil Corp. are or will be primarily liable therefor.

EIGHTH: That by reason of the foregoing, the defendant(s) Gulf Oil Corp. will be liable to the defendant(s) Joseph James, Inc. in the event and in the amount of a recovery herein by the plaintiff(s) and the defendant(s) Gulf Oil Corp. is bound to pay any and all attorneys fees and costs of investigation and disbursements.

WHEREFORE, the defendant(s) Joseph James, Inc. demands a judgment dismissing the complaint herein as to this answering defendant and further demands that the ultimate rights of the defendant(s) Joseph James, Inc. and Gulf Oil Corp. as between themselves be determined in this action, and that the defendant(s) Joseph James, Inc. have judgment over and against the defendant(s) Gulf Oil Corp. for the amount of any verdict of judgment which may be obtained herein by the plaintiff(s) against the defendant Joseph James, Inc. together with the costs and disbursements of the action plus all attorneys fees and all other costs herein.

WOLFMAN AND STANGER
Attorneys for Defendant
Joseph James, Inc.
By: LEWIS I. WOLF
Office & P. O. Address
10 Columbus Circle
Borough of Manhattan
City of New York (19)

Answer of Defendant Gulf Oil Corporation to Cross-Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., answering the cross-complaint upon information and belief,

FIRST: Denies all the averments contained in the paragraph of the cross-complaint numbered "3" except that it admits that prior to the commencement of this action, the defendant L. P. W. Realty Corp. sued herein as L.P.W. Realty Company, entered into a lease with the defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., wherein and whereby the defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., was given possession and control of premises 2153 8th Avenue, City, County and State of New York.

SECOND: Denies all the averments contained in the paragraph of the cross complaint numbered "5" except that it admits that the complaint seeks recovery against the defendants L.P.W. Realty Corp. and Lawrence Paul Wolf on the theory that the injuries allegedly sustained by the plaintiff resulted from the careless and negligent managing, operating, maintaining, controlling and ownership of the said premises.

THIRD: Denies all the averments contained in the paragraph of the cross complaint numbered "6".

AS AND FOR A SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE CAUSE AND/OR CAUSES OF ACTION, IF ANY, AS STATED IN THE DEFENDANT'S CROSS COMPLAINT, THIS DEFENDANT, GULF OIL CORPORATION SUED HEREIN AS GULF OIL CORP., ALLEGES UPON INFORMATION AND BELIEF:

FOURTH: That if the plaintiff suffered any injuries or damages as a result of the matters set forth in the com-

plaint, which is denied, such injuries or damages were not caused or contributed to in any manner by this defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp. but were caused in whole or in part by the negligence or fault of the defendant, L.P.W. Realty Corp. sued herein as L.P.W. Realty Company and Lawrence Paul Wolf, and/or the negligence or fault of the plaintiffs themselves.

WHEREFORE, the defendant, Gulf Oil Corporation sued herein as Gulf Oil Corp., demands judgment that the cross-complaint be dismissed with costs and disbursements of this action.

McLAUGHLIN, FISCELLA & BIANCHERI
By JAMES M. McLAUGHLIN
A member of the firm
Attorneys for Defendant
Gulf Oil Corporation sued herein as
Gulf Oil Corp.
Office & P. O. Address
80 John Street
New York 38, New York
DIgby 4-7000

Answer of L.P.W. Realty Co. and Lawrence Paul Wolf.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendants, L.P.W. Realty Company and Lawrence Paul Wolf, by I. Louis Winokur, Esq., their attorney, answering plaintiffs' complaint, set forth and allege as follows:

1. Deny each and every allegation contained in the complaint marked and numbered "Third", "Twelfth", "Thirteenth", "Seventeenth", "Twenty", "Twenty-one", "Twenty-two", "Twenty-three" and "Twenty-four".

2. Deny any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs of the complaint numbered "Fifteenth", "Sixteenth", "Eighteen" and "Nineteen".

AS AND FOR A CROSS-CLAIM AGAINST THE DEFENDANT GULF OIL CORP.

3. That heretofore and prior to the commencement of this action the defendant L.P.W. Realty Corp., sued herein as L.P.W. Realty Company, entered into a lease with the defendant Gulf Oil Corp., wherein and whereby the said defendant Gulf Oil Corp. was given full and exclusive control of premises 2153 8th Avenue, City, County and State of New York, and said defendant has since the date of said lease been in full and complete control of said premises and was in full and complete control thereof on the 28th day of June, 1966.

4. That said lease provides among other things, that the defendant Gulf Oil Corp. shall indemnify and hold the said L.P.W. Realty Corp., its successors and assigns, harmless from any loss or damages which they may sustain by reason of the recovery of any judgment by a person or persons injured on the premises by reason of the negligent operation and maintenance of the said premises.

Answer of L.P.W. Realty Co. and Lawrence Paul Wolf

5. That the complaint herein seeks recovery against defendants L.P.W. Realty Corp. and Lawrence Paul Wolf on the theory that the injuries allegedly sustained by the plaintiff resulted from the careless and negligent managing, operating, maintaining and controlling of the said premises.

6. That if a judgment is recovered against the defendants L.P.W. Realty Corp. and/or Lawrence Paul Wolf, said defendants are entitled to indemnity to the extent of the amount of such judgment.

WHEREFORE, the said defendants demand judgment against plaintiffs, dismissing the complaint, or in the alternative, if the plaintiffs recover judgment against the said defendants, the said defendants have judgment over against defendant Gulf Oil Corp. to the extent of the amount of such judgment; and that the said defendants have such other and further relief as to the court may seem just and proper.

Dated: May 23, 1968.

I. LOUIS WINOKUR
Attorney for Defendants
L.P.W. Realty Corp. and Lawrence Paul Wolf,
88-02 Sutphin Boulevard,
Jamaica, New York 11435

To:

Emile Z. Berman and A. Harold Frost, Esqs.,
Attorneys for Plaintiffs,
100 William Street,
New York, N. Y. 10038

Frank W. Morgan, Esq.
Attorney for Defendant
Gulf Oil Corporation
1290 Avenue of the Americas,
New York, N. Y. 10019

Third-Party Summons.

UNITED STATES DISTRICT COURT,

For The

SOUTHERN DISTRICT OF NEW YORK.

Civil Action File No. 67 Civ. 4959

JAMES V. McLEAN and JOSEPH LINFANTE,

Plaintiffs,

v.

L. P. W. REALTY COMPANY, LAWRENCE PAUL WOLF, GULF OIL CORP., JOSEPH JAMES, Inc. and JOSEPH JAMES,

Defendants.

GULF OIL CORPORATION,

Defendant and Third-Party Plaintiff,

v.

BEAMAN CORPORATION and UNITED PORCELAIN Co., Inc.,

Third-Party Defendants.

To the above-named Third-Party Defendants:

Beaman Corporation, 1046 Westside Drive, Greensboro, North Carolina

United Porcelain Co., Inc., Route 22 at Koehl Avenue, Union, New Jersey

You are hereby summoned and required to serve upon Emile Z. Berman and A. Harold Frost, Esqs. plaintiffs'

attorneys, whose address is 100 William Street, New York, New York 10038 and upon McLaughlin, Fiscella & Biancheri, Esqs. who are attorneys for the above named defendant and third-party plaintiff, and whose address is 80 John Street, New York, New York 10038 an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiffs which you may but are not required to answer.

JOHN J. OLEAR, JR.
Clerk of the Court.
By U. KRUGER
Deputy Clerk.

Dated: May 21, 1968.

Third-Party Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendant and third party plaintiff, Gulf Oil Corporation sued herein as Gulf Oil Corp., and hereinafter referred to as Gulf, by its attorneys, McLaughlin, Fiscella & Biancheri, alleges upon information and belief:

FIRST: That at all times hereinafter mentioned, the third party plaintiff, Gulf, was and still is a domestic corporation.

SECOND: That at all times hereinafter mentioned the third party defendant, Beaman Corporation, hereinafter referred to as Beaman was and still is a corporation duly organized and existing under the laws of the State of North Carolina, or some other state with an office and place of business at 1046 Westside Drive, Greensboro, North Carolina.

THIRD: That at all times hereinafter mentioned the third party defendant, United Porcelain Co., Inc., hereinafter referred to as United, was and still is a corporation duly organized and existing under the laws of the state of New Jersey or some other state with an office and place of business at Route 22 at Koehl Avenue, Union, New Jersey.

FOURTH: That on or about the December 14, 1967, the plaintiffs, James V. McLean and Joseph Linfante commenced an action against Gulf in which they seek to recover $375,000.00 and $250,000.00 respectively on account of personal injuries they allegedly sustained while lawfully in the premises as business visitors at 2153 Eighth Avenue, in the City of New York on the 28th day of June 1966. A copy of the complaint is annexed hereto and marked Exhibit "A". A copy of the answer to said complaint by Gulf is annexed hereto and marked Exhibit "B".

Third-Party Complaint

FIFTH: That prior to the commencement of this action, and prior to the date of this accident, the third party defendant Beaman entered into a contract with Gulf, whereby Beaman for a good and valuable consideration agreed to perform certain work, labor and services in connection with the installation of perimeter lighting at a service station at 2153 Eighth Avenue, New York said premises being the same as heretofore mentioned in the plaintiffs complaint.

SIXTH: That on or about June 28, 1966, the aforesaid contract between Gulf and Beaman was in force and effect.

SEVENTH: That pursuant to the terms of this contract, Beaman was designated the seller and Gulf the purchaser.

EIGHTH: That included in the terms of this contract was the following provision:

> "In case of entry by the seller, or any of the seller's agents or employees, upon the property or premises of the purchaser, for the purpose of construction, erection, inspection or delivery under this order, the seller agrees to provide all necessary and sufficient safeguards and to take all proper precautions, against the occurrence of accidents, injuries or damages to any persons or property, and to be responsible for and *to indemnify and save harmless the purchaser from all loss or damage and any or all claims by reason of accidents, injuries, including death or damage to any persons or property in connection with such work,* and from all fines, penalties or loss incurred by reason of the violation of any law, regulation or ordinance; and further agrees to defend at the seller's expense, any and all suits or actions, civil or criminal, arising out of such claims or matters;

and further agrees to procure and carry public liability and property damage insurance with contractual liability endorsement and such insurance of employees as may be required by any workmen's compensation act or other law, regulation or ordinance, which may apply in the premises."

NINTH: That the third party defendant Beaman subcontracted the entire construction portion of it's contract with Gulf to the third party defendant, United.

TENTH: That the third party defendant, Beaman as the general contractor was in control of all the work, labor and services in connection with the installation of the perimeter lighting and was obligated to supervise of the work to be performed by it or it's subcontractor.

ELEVENTH: That the third party defendant, Beaman was obligated as a general contractor to do it's work in a reasonably safe, careful proper and workmanlike manner.

TWELFTH: That the third party defendant, United was obligated to perform it's work under it's sub-contract in a reasonably safe, careful proper and workmanlike manner.

THIRTEENTH: That the plaintiffs at the time of their alleged injuries were performing work labor and services at the premises aforementioned as employees of the subcontractor, United.

FOURTEENTH: That if the plaintiffs sustained the injuries and damages in the manner and at the time and place as alleged in their complaint through any negligence other than their own, such injuries and damages were caused by the affirmative and active negligence of the third party defendants, their agents, servants and/or employees in causing and permitting the plaintiffs

to perform their work in affixing lighting fixtures to the service station building in a careless manner, thereby creating a dangerous condition and one likely to cause injuries to the plaintiffs and others lawfully upon the premises, in that they failed to properly supervise the work of the plaintiffs, in that they caused and directed the plaintiffs to perform their work under conditions unsafe for their welfare, in that they failed to inspect, observe and warn the plaintiffs of the dangerous condition of the temporarily hooked up fixture and allowing plaintiffs to continue working under said condition in such a manner as to exert excess weight on said fixture resulting in it's collapse and fall precipitating plaintiffs in that they failed to properly perform the terms and conditions of the general contract and sub contract, in that they failed to perform their work in a reasonably safe, careful, proper prudent and workmanlike manner pursuant to their contractual agreements which caused the plaintiffs to become injured without any primary fault on the part of Gulf, and if the third party plaintiff was negligent in any manner which is expressly denied, the negligence of said third party plaintiff was entirely passive.

FIFTEENTH: In view of the foregoing Beaman and/or United, is or will be liable over to Gulf, in the amount of any sums which may be recovered herein by the plaintiffs against the defendant, Gulf, together with the costs and disbursements incurred in defending this action, and by reason of the aforementioned contract between Beaman and Gulf, and by operation of law if the plaintiffs recover a judgment against Gulf, Gulf will be entitled to judgment over against Beaman, since at the time of Plaintiff's accident the work in progress was being performed by Beaman and/or it's subcontractor United, in furtherance of it's contract with Gulf and subject to the provisions of said contract by which Beaman

is obligated to indemnify Gulf and hold it harmless from any and all claims arising out of the work performed by Beaman or it's agents for Gulf.

WHEREFORE, the defendant, Gulf Oil Corporation demands judgment over against the third party defendants, Beaman Corporation and/or United Porcelain Co., Inc. in the amount of any sums which may be recovered by the plaintiffs, against Gulf Oil Corporation in this action together costs, disbursements and other expenses incurred in defending this action.

McLAUGHLIN, FISCELLA & BIANCHERI
By John J. Biancheri
A Member of the Firm
Attorneys for Defendant and Third Party Plaintiff, Gulf Oil Corporation
Office & P. O. Address
80 John Street
New York, N. Y. 10038
DIgby 4-7000

Answer of Third-Party Defendant Beaman Corporation.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The third party defendant, Beaman Corporation, by its attorneys Schaffner & D'Onofrio, Esqs.; answering the third party complaint of the defendant and third party plaintiff herein, as follows, upon information and belief:

FIRST: Denies any knowledge or information thereof sufficient to form a belief as to the allegations contained in the paragraphs designated, First, Third and Thirteenth.

SECOND: Admits each and every allegation contained in the paragraphs designated, Second, Fourth and Twelfth.

THIRD: Denies each and every allegation contained in the paragraphs designated, Fifth, Eighth and Ninth, and further states let the contract speak for itself.

FOURTH: Denies each and every allegation contained in the paragraphs designated, Sixth, Seventh, Tenth and Eleventh, and further states leave all further questions of law for Court.

FIFTH: Denies each and every allegation contained in the paragraphs designated, Fourteenth and Fifteenth.

AS AND FOR A FIRST, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE ALLEGED CAUSE OF ACTION THE THIRD PARTY DEFENDANT, BEAMAN CORPORATION, ALLEGES; UPON INFORMATION AND BELIEF:

SIXTH: That any injury or injuries sustained by the plaintiffs herein were not caused by any negligence or carelessness on the part of the third party defendant,

his servants, agents or employees, but were caused solely by the negligence and carelessness of the plaintiffs or some third party or parties over whom the third party defendant had no control and that said negligence and carelessness on the part of the plaintiffs or some third party or parties over whom the third party defendant Beaman Corporation had no control contributed to and caused the injuries complained of.

AS AND FOR A SECOND, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE ALLEGED CAUSE OF ACTION THE THIRD PARTY DEFENDANT, BEAMAN CORPORATION, ALLEGES; UPON INFORMATION AND BELIEF:

SEVENTH: That all the risks and dangers connected with the situation at the time and place mentioned in the complaint were open, obvious and apparent and were known to and assumed by the plaintiffs herein.

AS AND FOR A THIRD, SEPARATE AND COMPLETE AFFIRMATIVE DEFENSE TO THE ALLEGED CAUSE OF ACTION THE THIRD PARTY DEFENDANT, BEAMAN CORPORATION, ALLEGES; UPON INFORMATION AND BELIEF:

EIGHTH: That pursuant to Section 11, and other relevant provisions, of the Workmen's Compensation Law, the exclusive remedy of the plaintiffs, and employee, his personal representative, etc., is to receive benefits under the said Law, and the said plaintiffs, their personal representatives, etc., is, by the said Law, precluded from bringing an action at Common Law against this third party defendant.

Answer of Third-Party Defendant Beaman Corporation

FOR A CROSS CLAIM AGAINST UNITED PORCELAIN CO. INC., THIRD PARTY DEFENDANT IN THE ABOVE ENTITLED ACTION, AND PURSUANT TO RULE 13 (G) FRCP, THIRD PARTY DEFENDANT BEAMAN CORPORATION, ALLEGES UPON INFORMATION AND BELIEF:

NINTH: The third party defendant and cross claimant Beaman Corporation, was and still is a corporation duly organized and existing by and under the laws of the State of North Carolina.

TENTH: At all times hereinafter mentioned, the cross defendant, United Porcelain Co. Inc., hereinafter referred to as United, was and still is a corporation duly organized and existing under the laws of the State of New York and existing under the laws of the State of New Jersey or some other state with an office and place of business at Route 22 Koehl Avenue, Union, New Jersey.

ELEVENTH: On or about June 24th, 1966, the cross claimant and cross defendant entered into a contract whereby United agreed, for a certain consideration, to perform and complete certain work, labor and services in connection with the installation of perimeter lighting at a service station at 2153 Eighth Avenue, New York.

TWELFTH: All work done under said contract was under the exclusive management, maintenance, supervision, direction and control of United, its servants, agents and/or employees.

THIRTEENTH: In part of the aforementioned contract it was expressed that all work to be done in a proper workmanlike manner.

FOURTEENTH: The plaintiffs in their complaint allege in substance that on the 28th day of June, 1966 they were caused to sustain personal injuries while performing work, labor and services at 2153 Eighth Avenue in the City, County and State of New York.

Answer of Third-Party Defendant Beaman Corporation

FIFTEENTH: That if the plaintiffs sustained the injuries and damages in the manner at the time and place as alleged in their complaint through any negligence other than their own, such injuries and damages were caused by the affirmative and active negligence of the third party defendant United, its agents, servants and/or employees in causing and permitting the plaintiffs to perform their work in affixing lighting fixtures to the service station building in a careless manner, thereby creating a dangerous condition and one likely to cause injuries to the plaintiffs and others lawfully upon the premises, in that they failed to properly supervise the work of the plaintiffs, in that they caused and directed the plaintiffs to perform their work under conditions unsafe for their welfare, in that they failed to inspect, observe and warn the plaintiffs of the dangerous condition of the temporarily hooked up fixture and allowing plaintiffs to continue working under said condition in such a manner as to exert excess weight on said fixture resulting in it's collapse and fall precipitating plaintiffs in that they failed to properly perform the terms and conditions of the general contract and sub contract, in that they failed to perform their work in a reasonably safe, careful, proper prudent and workmanlike manner pursuant to their contractual agreements which caused the plaintiffs to become injured without any primary fault on the part of Beaman, and if the third party defendant Beaman was negligent in any manner which is expressly denied, the negligence of said third party plaintiff was entirely passive.

SIXTEENTH: By reason of the foregoing the cross defendant United will be liable to the cross claimant Beaman and bound to indemnify the cross claimant Beaman in the event of a recovery herein by the plaintiff against the cross claimant Beaman and bound to pay to the cross claimant Beaman any and all attorney's fees, costs of investigations and disbursements.

Answer of Third-Party Defendant Beaman Corporation

WHEREFORE, the third party defendant and cross claimant Beaman, demands judgment dismissing the third party complaint herein as to itself with costs and further demands pursuant to Rule 13 (g) FRCP that the ultimate rights of the third party defendant Beaman and the cross defendant United in this action as between themselves be determined in this action, and that the defendant Beaman, have judgment over and against the cross defendant United for the amount of any verdict or judgment which may be obtained herein by the plaintiffs against the defendant Beaman together with costs and disbursements in this action.

Dated: New York, New York
July 8, 1968

Yours, etc.,

SCHAFFNER & D'ONOFRIO
Attorneys for Third-Party Defendant-
Beaman Corporation
By: NICHOLAS A. D'ONOFRIO
A Member of the Firm
123 William Street
New York, New York 10038
WOrth 4-2700

To:

McLaughlin, Fiscella & Biancheri, Esqs.
Attorneys for Defendant and Third-Party
Plaintiff-Gulf Oil Corporation
80 John Street
New York, New York 10038

Emile Z. Berman & A. Harold Frost, Esqs.
Attorneys for Plaintiffs
100 William Street
New York, New York 10038

United Porcelain Co. Inc.
Third-Party Defendant
Route 22 at Koehl Avenue
Union, New Jersey

Answer of Third-Party Defendant United Porcelain Co., Inc., to Third-Party Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

United Porcelain Co., Inc., one of the Third Party Defendants, appearing by Francis J. Heneghan, its attorney, as and for its separate third party answer to the third party complaint herein.

FIRST: Denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs designated "First", "Second", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Tenth", and "Eleventh" of the Third Party Complaint.

SECOND: Denies upon information and belief each and every allegation contained in paragraphs designated "Ninth" and "Fourteenth" of the Third Party Complaint.

THIRD: Denies upon information and belief each and every allegation contained in paragraphs designated "Twelfth" and "Fifteenth" of the Third Party Complaint and respectfully refers all questions of law to this Honorable Court.

FOURTH: Denies upon information and belief each and every allegation contained in paragraph designated "Thirteenth" of the third party complaint respectfully refers all questions of law to this Honorable Court except admits that the plaintiffs at the time of their alleged injuries were performing work, labor and services at the premises, aforesaid, as employees of United Porcelain Co., Inc.

Answer of Third-Party Defendant United Porcelain Co., Inc., to Third-Party Complaint

AS AND FOR A FIRST SEPARATE, AFFIRMATIVE AND DISTINCT DEFENSE TO PLAINTIFFS' ACTION, THE THIRD PARTY DEFENDANT, UNITED PORCELAIN CO., INC., RESPECTFULLY SETS FORTH AND ALLEGES UPON INFORMATION AND BELIEF:

FIFTH: That the injuries alleged to have been sustained by the plaintiffs, if any, were caused in whole or in part by the plaintiffs' own negligence.

AS AND FOR A SECOND SEPARATE, AFFIRMATIVE AND DISTINCT DEFENSE TO PLAINTIFFS' ACTION, THE THIRD PARTY DEFENDANT, UNITED PORCELAIN CO., INC., RESPECTFULLY SETS FORTH AND ALLEGES UPON INFORMATION AND BELIEF:

SIXTH: That the injuries alleged to have been sustained by the plaintiffs, if any, were sustained while they were at work in an employment into which they had entered, knowing full well the hazard thereof and the inherent risk incident to such employment and knowing the methods to be used in the performance of such work, and the dangers thereof; that such risks and dangers were expected and assumed by the plaintiffs' upon entering into and continuing in such employment.

WHEREFORE, Third Party Defendant, United Porcelain Co., Inc., demand judgment dismissing the Third Party Complaint herein as to it, together with the costs and disbursement of this action.

Dated: New York, New York
March 7, 1969

FRANCIS J. HENEGHAN
Attorney for Third Party Defendant
United Porcelain Co., Inc.
Office & P. O. Address
200 Park Avenue
New York, New York 10017
Telephone #973-3179

Amended Supplemental Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

FOR A FIRST CLAIM ON BEHALF OF PLAINTIFF JAMES V. MCLEAN

FIRST: That at all times hereinafter mentioned, plaintiffs were and still are residents and citizens of the State of New Jersey.

SECOND: Upon information and belief, at all times hereinafter mentioned, defendant L. P. W. Realty Company was a New York corporation with its principal place of business in the State of New York.

THIRD: Upon information and belief, at all times hereinafter mentioned, defendant Lawrence Paul Wolf was a resident and citizen of the State of New York.

FOURTH: Upon information and belief, at all times hereinafter mentioned, defendant Gulf Oil Corporation was and still is a Pennsylvania corporation with its principal place of business in the State of Pennsylvania.

FIFTH: That upon information and belief, at all times hereinafter mentioned, defendant Joseph James, Inc., was and still is a New York corporation with its principal place of business in the State of New York.

SIXTH: That upon information and belief, at all times hereinafter mentioned, defendant Joseph James was and still is a resident and citizen of the State of New York.

SEVENTH: That upon information and belief, at all times hereinafter mentioned, defendant L. P. W. Realty Company was a corporation organized under and with its principal place of business in a State other than the State of New Jersey.

EIGHTH: That upon information and belief, at all times hereinafter mentioned, defendant Gulf Oil Corporation was a corporation organized and with its principal place of business in a State other than the State of New Jersey.

NINTH: That upon information and belief, at all times hereinafter mentioned, defendant Joseph James, Inc., was a corporation organized and with its principal place of business in a State other than the State of New Jersey.

TENTH: Upon information and belief, at all times hereinafter mentioned, defendant Lawrence Paul Wolf was a citizen of a State other than the State of New Jersey.

ELEVENTH: Upon information and belief, at all times hereinafter mentioned, defendant Joseph James was a citizen of a State other than the State of New Jersey.

TWELFTH: Upon information and belief, at all times hereinafter mentioned, defendant L. P. W. Realty Company owned certain premises known as 2153 Eighth Avenue in the City, County and State of New York.

THIRTEENTH: Upon information and belief, at all times hereinafter mentioned, defendant Lawrence Paul Wolf owned premises known as 2153 Eighth Avenue in the City, County and State of New York.

FOURTEENTH: Upon information and belief, at all times hereinafter mentioned, defendant Gulf Oil Corporation was a lessee of premises number 2153 Eighth Avenue in the City, County and State of New York.

FIFTEENTH: Upon information and belief, at all times hereinafter mentioned, defendant Joseph James, Inc. was a lessee of premises number 2153 Eighth Avenue in the City, County and State of New York.

SIXTEENTH: Upon information and belief, at all times hereinafter mentioned, defendant Joseph James was a lessee of premises number 2153 Eighth Avenue in the City, County and State of New York.

SEVENTEENTH: Upon information and belief, at all times hereinafter mentioned, defendants managed, operated, maintained and controlled premises under 2153 Eighth Avenue in the City, County and State of New York.

EIGHTEENTH: That on the 28th day of June, 1966, the plaintiffs herein were lawfully upon the said premises 2153 Eighth Avenue in the City, County and State of New York.

NINETEENTH: That on the 28th day of June, 1966, the defendants herein were business visitors in the aforesaid premises 2153 Eighth Avenue in the City, County and State of New York.

TWENTIETH: That on the 28th day of June, 1966, while the plaintiffs herein were lawfully in the said premises 2153 Eighth Avenue in the City, County and State of New York, they were caused to be precipitated by reason of the carelessness and negligence of the defendants in carelessly and negligently managing, operating, maintaining, controlling and owning the aforesaid premises and being otherwise negligent and careless in other respects.

TWENTY-FIRST: That by reason of the said occurrence, the plaintiff James V. McLean sustained devastating injuries to his body; he suffered and continues to suffer great pain and mental anguish as a consequence of said injuries; he required, and upon information and belief continues to require medical aid and attention as a result of said injuries; he became obligated for and continues to become obligated for large sums on account of his said injuries; he was prevented from pursuing his normal avocation; and he was otherwise damaged.

TWENTY-SECOND: That by reason of the foregoing, the plaintiff, James V. McLean claims damages in the sum of Three Hundred Seventy-Five Thousand ($375,000.00) Dollars.

AS AND FOR A SECOND CLAIM AND A FIRST CLAIM ON BEHALF OF PLAINTIFF, JOSEPH LINFANTE.

TWENTY-THIRD: That by reason of the said occurrence, the plaintiff, Joseph Linfante, sustained devastating injuries to his body; he suffered and continues to suffer great pain as a consequence of said injuries; he required, and upon information and belief, continues to require medical aid and attention; he was prevented from pursuing his normal avocation; he became obligated for large sums on account of his said injuries; and he was otherwise damaged.

TWENTY-FOURTH: That by reason of the foregoing, the plaintiff, Joseph Linfante, claims damages in the sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars.

AS AND FOR A THIRD CLAIM AND A FIRST CLAIM ON BEHALF OF PLAINTIFF, ETHEL MCLEAN.

TWENTY-FIFTH: That at all times hereinafter mentioned, this plaintiff was the wife of the plaintiff, James V. McLean, and was entitled to his consortium, including his services, society, support and companionship.

TWENTY-SIXTH: That by reason of the foregoing, this plaintiff has been deprived of the consortium of the co-plaintiff, James V. McLean, including his services, society, support and companionship.

TWENTY-SEVENTH: That by reason of the foregoing, the plaintiff, Ethel McLean, claims damages in the sum of Twenty-Five Thousand ($25,000.00) Dollars.

Amended Supplemental Complaint

AS AND FOR A FOURTH CLAIM AND A FIRST CLAIM ON BEHALF OF PLAINTIFF, SUSAN LINFANTE.

TWENTY-EIGHTH: That at all times hereinafter mentioned, this plaintiff was the wife of the co-plaintiff, Joseph Linfante, and was entitled to his consortium, including his services, society, support and companionship.

TWENTY-NINTH: That by reason of the foregoing, this plaintiff has been deprived of the consortium of the co-plaintiff, Joseph Linfante, including his services, society, support and companionship.

THIRTIETH: That by reason of the foregoing, the plaintiff, Susan Linfante, claims damages in the sum of Fifteen Thousand ($15,000.00) Dollars.

WHEREFORE, plaintiff James E. McLean demands judgment against defendants in the sum of Three Hundred Seventy-Five Thousand ($375,000.00) Dollars on the First Claim; Plaintiff Joseph Linfante claims judgment against defendants in the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars on the Second Claim and the First Claim on behalf of plaintiff Joseph Linfante; plaintiff Ethel McLean claims damages in the sum of Twenty-five Thousand ($25,000.00) Dollars on the Third Claim and the First Claim on behalf of the plaintiff Ethel McLean; and plaintiff Susan Linfante claims damages against defendants in the sum of Fifteen Thousand ($15,000.00) Dollars on the Fourth Claim and the First Claim on behalf of plaintiff Susan Linfante, altogether with the costs and disbursements of this action.

EMILE Z. BERMAN and A. HAROLD FROST
Attorneys for Plaintiffs
By: A. Harold Frost
Member of the Firm
Office and P. O. Address
100 William Street
New York, New York 10038

Answer and Cross-Claim of Defendant Joseph James, Inc., to Amended and Supplemental Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The defendants, Joseph James, Inc. and Joseph James, by the undersigned attorneys, answering the amended and supplemental complaint of the plaintiffs herein alleges:

FIRST: Deny any knowledge or information sufficient to form a belief as to any of the allegations contained in the paragraphs of the amended and supplemental complaint designated as follows: "First", "Third", "Fourth", "Seventh", "Eighth", "Tenth", "Eleventh", "Twenty-Fifth" and "Twenty-Eighth".

SECOND: Deny each and every allegation in the paragraphs of the amended and supplemental complaint designated as follows: "Thirteenth", "Sixteenth", "Seventeenth", "Eighteenth", "Nineteenth", "Twentieth", "Twenty-First", "Twenty-Second" and "Twenty-Third".

THIRD: Deny each and every allegation in the paragraph of the amended and supplemental complaint designated as follows: "Fifteenth" except admits at the time mentioned in the complaint, defendant Joseph James, Inc. was a sub-franchisee operating at premises number 2153 Eighth Avenue in the City, County and State of New York.

AS AND FOR A FIRST COMPLETE AFFIRMATIVE ABSOLUTE DEFENSE TO THE ENTIRE ACTION HEREIN:

FOURTH: The court lacks jurisdiction over the person of the defendants, Joseph James, Inc. and Joseph James in that neither said defendants nor their attorneys have ever been properly served with the summons and

amended and supplemental complaint herein and defendants do not waive defense by their appearance herein.

AS AND FOR A SECOND COMPLETE AFFIRMATIVE ABSOLUTE DEFENSE TO THE THIRD AND FOURTH CAUSES OF ACTION HEREIN:

FIFTH: Action was not commenced within three (3) years after the accrual of the alleged third and fourth causes of action set forth in the complaint and third and fourth causes of action are therefore barred by Statute of Limitations. and this amendment does not relate back.

AS AND FOR A THIRD COMPLETE AFFIRMATIVE ABSOLUTE DEFENSE WHICH IS TO THE THIRD AND FOURTH CAUSES OF ACTION HEREIN:

SIXTH: This purported amended and supplemental complaint is not authorized by any court or law since it was not served within 20 days from the date of the order.

AS AND FOR A FOURTH COMPLETE AFFIRMATIVE ABSOLUTE DEFENSE TO THE ENTIRE ACTION, THE DEFENDANTS RESPECTFULLY SHOWS THAT:

SEVENTH: If the plaintiffs sustained any injuries at the time and place alleged in the complaint then said injuries were caused by reason of the negligence of plaintiffs contributing thereto.

AS AND FOR A FIFTH COMPLETE AFFIRMATIVE ABSOLUTE DEDEFENSE TO THE ENTIRE ACTION HEREIN:

EIGHTH: As to the entire action the court lacks jurisdiction over the person of the defendants, Joseph James,

Inc. and Joseph James in that said defendants have never been properly served with the summons and complaint herein and defendant does not waive defense by its appearance herein.

AS AND FOR A SIXTH COMPLETE AFFIRMATIVE DEFENSE TO THE ENTIRE ACTION HEREIN:

NINTH: Upon information and belief, plaintiff herein, for a good and valuable consideration did execute and deliver to Gulf Oil Corp. a general release by which said release plaintiff did forever remise, remit and release defendant an alleged tort feasor from any and all claims, causes of action and suits arising out of the accident allegedly occurring on June 19, 1966, thereby releasing these answering defendants.

FOR A SEPARATE AND COMPLETE DEFENSE TO THE ENTIRE COMPLAINT HEREIN AND AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANTS GULF OIL CORPORATION AND 3RD PARTY DEFENDANTS BEAMAN CORPORATION AND UNITED PORCELAIN CO. INC. THE DEFENDANTS JOSEPH JAMES, INC. AND JOSEPH JAMES PURSUANT TO THE CPLR, DEMANDS THAT THE ULTIMATE RIGHTS OF THE DEFENDANTS JOSEPH JAMES, INC. AND JOSEPH JAMES BE DETERMINED IN THIS ACTION, AND AS AND FOR A CROSS-CLAIM AGAINST THE DEFENDANTS GULF OIL CORPORATION AND 3RD PARTY DEFENDANTS BEAMAN CORPORATION AND UNITED PORCELAIN CO. INC. THE DEFENDANTS JOSEPH JAMES, INC. AND JOSEPH JAMES, RESPECTFULLY ALLEGES:

TENTH: That if the plaintiffs were caused to sustain damages at the time and place set forth in the plaintiffs complaint through any carelessness, recklessness, negli-

gence other than the plaintiffs own carelessness, recklessness and negligence, said damages were sustained by reason of the sole active and primary carelessness, recklessness and negligence and/or affirmative acts of omission or commission by the defendants Gulf Oil Corporation and 3rd party defendants Beaman Corporation and United Porcelain Co. Inc., its agents, servants and/or employees; and if any judgment is recovered herein by the plaintiffs against the defendants Joseph James, Inc. and Joseph James it will be damaged thereby and the defendants Gulf Oil Corporation and 3rd party defendants, Beaman Corporation and United Porcelain Co., Inc. are or will be primarily liable therefor.

ELEVENTH That by reason of the foregoing, the defendants Gulf Oil Corporation and 3rd party defendants Beaman Corporation and United Porcelain Co., Inc. will be liable to the defendants Joseph James Inc. and Joseph James in the event and in the amount of a recovery herein by the plaintiffs and the defendants Gulf Oil Corporation and 3rd party defendants, Beaman Corporation and United Porcelain Co., Inc. are bound to pay any and all attorneys fees and costs of investigation and disbursements.

WHEREFORE, the defendants Joseph James, Inc. and Joseph James demand a judgment dismissing the complaint herein as to these answering defendants and further demand that the ultimate rights of the defendants Joseph James, Inc. and Joseph James and Gulf Oil Corporation and 3rd party defendants Beaman Corporation and United Porcelain Co. Inc. as between themselves be determined in this action, and that the defendants Joseph James, Inc. and Joseph James have judgment over and against the defendants Gulf Oil Corporation and

Answer and Cross-Claim of Defendant Joseph James, Inc., to Amended and Supplemental Complaint

3rd party defendants Beaman Corporation and United Porcelain Co. Inc. for the amount of any verdict of judgment which may be obtained herein by the plaintiffs against the defendants Joseph James Inc. and Joseph James together with the costs and disbursements of the action plus all attorneys fees and all other costs herein.

WOLFMAN AND STANGER
Attorneys for Defendants Joseph James, Inc. and Joseph James
By: Edward K. Koudelka
Office & P. O. Address
10 Columbus Circle
New York, New York 10019
Tel. No. 957-4023

Answer and Cross-Claim of Defendant Gulf Oil Corp. to Amended and Supplemental Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Defendant Gulf Oil Corporation, answering the Amended and Supplemental Complaint upon information and belief, alleges:

AS TO THE FIRST CLAIM ON BEHALF OF PLAINTIFF JAMES V. MCLEAN:

FIRST: The defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraphs of the Amended and Supplemental Complaint numbered "First", "Second", "Third", "Fifth", "Sixth", "Seventh", "Ninth", "Tenth", "Eleventh", "Twelfth", "Thirteenth" and "Eighteenth".

SECOND: Denies all the averments contained in the paragraphs of the Amended and Supplemental Complaint numbered "Seventeenth", "Twentieth", "Twenty-First" and "Twenty-Second".

THIRD: Denies all the averments contained in the paragraph of the Amended and Supplemental Complaint numbered "Nineteenth", and the defendant is without knowledge or information sufficient to form a belief as to the truth of the averments contained in the paragraph of the Amended and Supplemental Complaint numbered "Nineteenth" as to whether the plaintiffs herein were business visitors at the premises mentioned therein.

AS TO A SECOND CLAIM AND A FIRST CLAIM ON BEHALF OF PLAINTIFF JOSEPH LINFANTE

FOURTH: Denies all the averments contained in the paragraphs of the Amended and Supplemental Complaint numbered "Twenty-Third" and "Twenty-Fourth".

Answer and Cross-Claim of Defendant Gulf Oil Corp. to Amended and Supplemental Complaint

AS TO A THIRD CLAIM AND A FIRST CLAIM ON BEHALF OF PLAINTIFF ETHEL MCLEAN:

FIFTH: Denies knowledge or information sufficient to form a belief concerning the allegations contained in the paragraph of the Amended and Supplemental Complaint numbered "Twenty-Fifth".

SIXTH: Denies the allegations contained in the paragraphs of the Amended and Supplemental Complaint numbered "Twenty-Sixth" and "Twenty-Seventh".

AS TO A FOURTH CLAIM AND A FIRST CLAIM ON BEHALF OF PLAINTIFF SUSAN LINFANTE:

SEVENTH: Denies knowledge or information sufficient to form a belief as to the allegations contained in the paragraph of the Amended and Supplemental Complaint numbered "Twenty-Eighth".

EIGHTH: Denies the allegations of the Amended and Supplemental Complaint contained in the paragraphs numbered "Twenty-Ninth" and "Thirtieth".

AS AND FOR A SEPARATE, AFFIRMATIVE AND COMPLETE DEFENSE TO THE CAUSE AND/OR CAUSES OF ACTION, IF ANY, AS STATED IN THE COMPLAINT ON BEHALF OF THE PLAINTIFFS, THIS DEFENDANT, GULF OIL CORPORATION, ALLEGES UPON INFORMATION AND BELIEF:

NINTH: That, if the plaintiffs suffered any injuries or damages as a result of the matters set forth in the Amended and Supplemental Complaint, which is denied, such injuries or damages were not caused or contributed to in any manner by this defendant, Gulf Oil Corporation, but were caused in whole or in part by the plaintiffs' own negligence, carelessness and/or fault.

Answer and Cross-Claim of Defendant Gulf Oil Corp. to Amended and Supplemental Complaint

AS AND FOR A FIRST CROSS COMPLAINT AND A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANTS JOSEPH JAMES, INC. AND JOSEPH JAMES, THIS DEFENDANT, GULF OIL CORPORATION, HEREINAFTER REFERRED TO AS "GULF", DEMANDS THAT THE ULTIMATE RIGHTS OF THIS DEFENDANT, GULF, AND JOSEPH JAMES, INC. AND JOSEPH JAMES, CO-DEFENDANTS IN THIS ACTION, AS BETWEEN THEMSELVES, BE DETERMINED IN THIS ACTION, AND ALLEGES UPON INFORMATION AND BELIEF:

TENTH: That pursuant to a lease entered into by and between the defendants Joseph James, Inc. and/or Joseph James prior to June 28, 1966, the defendants Joseph James, Inc. and/or Joseph James were and are the lessee of a certain gasoline service station located at 301 West 116th Street, also known as 2153 8th Avenue, in the City of New York, New York, which station was at all the times hereinafter mentioned under the exclusive control of the defendants Joseph James, Inc. and/or Joseph James.

ELEVENTH: That when the aforesaid lease was entered into by and between the parties thereto as described above, the defendants Joseph James, Inc. and/or Joseph James represented and covenanted to this defendant, Gulf, that the defendants Joseph James, Inc. and/or Joseph James, the lessee, would keep the premises, buildings, equipment, fixtures, sidewalks, approaches and driveways in good condition neat and clean, properly lighted, properly equipped, and in a good, safe and proper condition.

TWELFTH: That at all the times mentioned in the Amended and Supplemental Complaint and at all the times hereinafter mentioned, and more particularly on or about June 28, 1966, the defendants Joseph James, Inc. and/or Joseph James used and occupied the aforesaid

premises pursuant to the aforesaid lease as lessee of this defendant, Gulf.

TIRTEENTH: That the defendants Joseph James, Inc. and/or Joseph James, in the aforementioned lease made representations, warranties, and covenants, one of which recites as follows:

> "Lessee agrees to exonerate, save harmless, protect and indemnify lessor from any and all losses, damages, claims, suits or actions, judgments and costs which may arise or grow out of any injury to or death of any person or persons or damage to any property caused by or in any manner connected with the use, possession, repair or condition of said premises or any equipment or fixtures thereon."

FOURTEENTH: That this defendant, Golf, had performed any and all obligations undertaken by it in the aforesaid lease, and is entitled to all of the representations, warranties, covenants and hold harmless clauses accruing to its benefit from the aforesaid lease.

FIFTEENTH: That at all the times referred to in the Amended and Supplemental Complaint and at all the times hereinafter mentioned, and more particularly on or about June 28, 1966, the aforesaid lease with all of the covenants, warranties, representations and hold harmless clauses therein was in full force and effect.

SIXTEENTH: That, if the plaintiffs James V. McLean and/or Joseph Linfante were caused to sustain certain personal injuries, and if certain damages were sustained at the time and place mentioned in the Amended and Supplemental Complaint and in the manner and amount alleged therein through any carelessness, recklessness and negligence other than the carelessness, recklessness and negligence of the plaintiffs James V. McLean and Joseph Linfante, said injuries and damages

were caused by reason of the violation of the terms and conditions of the aforesaid lease and also by breach of the aforesaid covenants by the defendants Joseph James, Inc. and/or Joseph James, their agents, servants and/or employees, and by virtue of the aforesaid agreement to save harmless and indemnify this defendant, Gulf, if any judgment is recovered herein by the plaintiffs against this defendant, Gulf, it will be damaged thereby, and the defendants Joseph James, Inc. and/or Joseph James, are or will be primarily responsible therefor.

SEVENTEENTH: That, by reason of the foregoing, the defendants Joseph James, Inc. and/or Joseph James will be liable to this defendant, Gulf, and bound to pay to this defendant, Gulf, in the event of a recovery herein by the plaintiffs against this defendant, Gulf, the amount of any such recovery as well as any and all attorneys' fees and costs of investigations and disbursements.

AS AND FOR A SECOND CROSS COMPLAINT AND AS A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANTS JOSEPH JAMES, INC. AND JOSEPH JAMES, THIS DEFENDANT, GULF OIL CORPORATION, HEREINAFTER REFERRED TO AS "GULF", DEMANDS THAT THE ULTIMATE RIGHTS OF THIS DEFENDANT, GULF, AND JOSEPH JAMES, INC. AND JOSEPH JAMES, CO-DEFENDANTS IN THIS ACTION, AS BETWEEN THEMSELVES, BE DETERMINED IN THIS ACTION, AND ALLEGES UPON INFORMATION AND BELIEF:

EIGHTEENTH: This defendant, Gulf, repeats, reiterates and realleges each and every allegation contained in paragraphs numbered "Ninth" through "Seventeenth" inclusive of the first cross complaint with the same force and effect as if herein set forth at length.

NINETEENTH: That, at all the times referred to in the Amended and Supplemental Complaint, and at all the times hereinafter mentioned, the aforesaid gasoline

service station was under the exclusive control, charge, operation, supervision and management of the defendants Joseph James, Inc. and/or Joseph James, their agents, servants and/or employees.

TWENTIETH: That, at all the times referred to in the Amended and Supplemental Complaint and at all the times hereinafter mentioned, it was the duty of the defendants Joseph James, Inc. and/or Joseph James, their agents, servants and/or employees to keep the said gasoline service station in good repair and in a proper and safe condition.

TWENTY-FIRST: That the plaintiffs allege that on the 28th day of June, 1966, while the plaintiffs were lawfully on the aforesaid premises, they were caused to be precipitated by reason of the carelessness and negligence of the defendants.

TWENTY-SECOND: That said occurrence was due to the carelessness and negligence of the defendants Joseph James, Inc. and/or Joseph James, their agents, servants and/or employees in the control, operation, charge, supervision and management of the aforesaid gasoline service station, of which the defendants Joseph James, Inc. and/or Joseph James, had due notice, and through no fault or lack of care on the part of this defendant, Gulf.

TWENTY-THIRD: That, if the plaintiffs James V. McLean and/or Joseph Linfante were caused to sustain certain personal injuries, and if certain damages were sustained at the time and place mentioned in the Amended and Supplemental Complaint through any carelessness, recklessness and negligence other than the carelessness, recklessness and negligence of the plaintiffs James V. McLean and Joseph Linfante, said injuries and damages were caused by reason of the sole, active and primary carelessness, recklessness and negligence and/or affirmative acts or omission or commission by

the defendants Joseph James, Inc. and/or Joseph James, their agents, servants and/or employees, and if any judgment is recovered herein by the plaintiffs against this defendant, Gulf, it will be damaged thereby, and the defendants, Joseph James, Inc. and/or Joseph James are or will be primarily responsible therefor.

TWENTY-FOURTH: That, by reason of the foregoing, the defendants Joseph James, Inc. and/or Joseph James will be liable to this defendant, Gulf, and bound to indemnify this defendant, Gulf, in the event of a recovery herein by the p'aintiffs against this defendant, Gulf, and bound to pay to this defendant, Gulf, the amount of any such recovery as well as any and all attorneys' fees and costs of investigations and disbursements.

WHEREFORE, the defendant Gulf Oil Corporation demands judgment dismissing the Amended and Supplemental Complaint herein as to it with costs, and further demands, pursuant to Section 3019 (b) of the Civil Practice Law and Rules of the State of New York, that the ultimate rights of this defendant, Gulf Oil Corporation, and Joseph James, Inc. and/or Joseph James, co-defendants in this action as between themselves be determined in this action and that the defendant Gulf Oil Corporation have judgment over and against the defendants Joseph James, Inc. and/or Joseph James for the amount of any verdict or judgment which may be obtained herein by the plaintiffs against this defendant, Gulf Oil Corporation together with the costs and disbursements of this action.

ROBERT HILL NIX
Attorney for Defendant Gulf Oil Corporation
Office & P. O. Address:
54 Mineola Boulevard
Mineola, New York 11501
Tel.: 516 CHapel 8-4634

Answer of Third-Party Defendant, United Porcelain Co., Inc., to Supplemental Complaint.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

The third-party defendant, United Porcelain Co., Inc., above named by its attorneys Hampton, Dietel & Heneghan, answering the Supplemental Complaint of the plaintiffs herein, respectfully shows to this Court and alleges as follows:

ANSWERING FOR A FIRST CROSS COMPLAINT AND A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANTS JOSEPH JAMES, INC. AND JOSEPH JAMES, THIS DEFENDANT, GULF OIL CORPORATION, HEREINAFTER REFERRED TO AS "GULF" DEMANDS THAT THE ULTIMATE RIGHTS OF THIS DEFENDANT, GULF, AND JOSEPH JAMES, INC. AND JOSEPH JAMES CO-DEFENDANTS IN THIS ACTION, AS BETWEEN THEMSELVES, BE DETERMINED IN THIS ACTION, AND ALLEGES UPON INFORMATION AND BELIEF:

1. Denies upon information and belief each and every allegation contained in paragraphs designated "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth", "Sixteenth" and "Seventeenth" of the Supplemental Complaint herein.

ANSWERING FOR A SECOND CROSS COMPLAINT AND A BASIS FOR AFFIRMATIVE RELIEF AGAINST THE DEFENDANTS JOSEPH JAMES, INC. AND JOSEPH JAMES, THIS DEFENDANT, GULF OIL CORPORATION, HEREINAFTER REFERRED TO AS "GULF" DEMANDS THAT THE ULTIMATE RIGHTS OF THIS DEFENDANT, GULF, AND JOSEPH JAMES, INC. AND JOSEPH JAMES, CO-DEFENDANTS IN THIS ACTION, AS BETWEEN THEMSELVES, BE DETERMINED IN THIS ACTION, AND ALLEGES UPON INFORMATION AND BELIEF:

2. Answering paragraph "Eighteenth" of the Supplemental Complaint herein, the third-party defendant re-

peats, reiterates and realleges each and every admission and denial heretofore made in answer to paragraphs designated "Ninth" through "Seventeenth" inclusive of the Supplemental Complaint herein.

3. Denies upon information and belief each and every allegation contained in paragraphs designated "Nineteenth", "Twentieth", "Twenty-Two", "Twenty-Three" and "Twenty-Fourth" of the complaint herein.

4. Denies that it has any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph designated "Twenty-First" of the complaint herein.

WHEREFORE, the third-party defendant demands judgment dismissing the Supplemental Complaint herein, together with the costs and disbursements of the action.

HAMPTON, DIETEL & HENEGH[illegible]N
Attorneys for Third-Party Def[illegible]dant
United Porcelain Co., Inc.
Office & P. O. Address
110 William Street
New York, 10038

Pre-trial Order.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

On October 22, 1971, the parties to this action or their attorneys appeared before the Court at a pre-trial conference to Local Calendar Rules 6 and 13 and Rule 16 of the Federal Rules of Civil Procedure, and the following action was taken:

1. The pleadings were agreed to be deemed amended in accordance with the framing of the issues in this action in paragraph "8" of this pre-trial order.

2. Parties agreed that the trial of this action shall be based upon the current pleadings and no amendments are required to the pleadings, except that the caption is amended so that L.P.W. Realty Corp. be and the same hereby is substituted as the defendant for L.P.W. Realty Company. The actions against Lawrence Paul Wolf and Joseph James are discontinued with prejudice and without costs.

3(a). The parties stipulated that the following facts are not in dispute in this action (each party reserving the right to object to the materiality of any such stipulated fact and its relevancy to the issues).

1. It is admitted that at the time of the commencement of this action, and at the present time, the plaintiffs were and are residents and citizens of the State of New Jersey.

2. It is admitted by all of the corporate defendants that they are citizens of the State of New York, and none of their principal places of business are in the State of New Jersey.

3. It is admitted that the defendant L.P.W. Realty Corp. was the owner of premises 2153 Eighth Avenue

in the Borough of Manhattan, City, County and State of New York.

4. It is admitted by the defendant Gulf Oil Corporation that at all times mentioned in the Complaint, this defendant was a lessee of the aforesaid premises in accordance with a lease entered into between defendant L.P.W. Realty Corp. and Gulf Oil Corporation.

5. It is admitted that at all times mentioned in the Complaint, the defendant Joseph James, Inc. was a sublessee of the premises by virtue of a lease entered into with defendant Gulf Oil Corporation.

6. It is admitted that at all times mentioned in the Complaint, the plaintiffs James V. McLean and Joseph Linfante were employees of third-party defendant United Porcelain Co., Inc. and on the premises in the course of their employment.

7. It is admitted that on the 28th day of June, 1966, while plaintiffs James V. McLean and Joseph Linfante were working on the aforesaid premises, they were precipitated downward.

8. It is admitted that defendant Gulf Oil Corporation contracted with third-party defendant Beaman Corporation to install an overhang and perimeter lighting on the subject premises and that such contract is evidenced by the documents marked as plaintiffs' exhibit 6 for identification at the deposition of Howard G. Spencer on 6/19/70.

9. It is admitted that third-party defendant Beaman Corporation contracted with third-party defendant United Porcelain Co., Inc. to do the erection work at the subject premises, as is evidenced by the purchase order dated 6/20/66 which is part of plaintiffs' exhibit 6 for identification, marked at the deposition of Howard G. Spencer on June 19, 1970.

3(b). The plaintiffs claim that the aforesaid accident occurred by reason of the carelessness and negligence of the defendants L.P.W. Realty Corp., owner of the aforesaid premises, of Gulf Oil Corporation, which leased the aforesaid premises from the owner, and of Joseph James, Inc., the lessee in possession, in that they failed to inspect and maintain the aforesaid premises so as to avoid the occurrence and in that they failed to take proper precaution to avoid the occurrence herein, and specifically, in that the area of the building in and about the coping and roof was not safe for the nature of the work to be performed.

The plaintiff James V. McLean sustained devastating injuries to his body as a consequence of this accident. He suffered, amongst other injuries, a comminuted fracture of the right femur with the fracture continuing through the lesser trochanter; a laceration of the left leg over the left medial calf, all with permanent shortening of the right lower extremity. The right comminuted spiral subtrochanteric fracture of the right hip required major open surgery in the form of open reduction and internal fixation of a large intramedullary nail with three screws. The penetrating wound of the left anterior medial aspect of his left leg was debrided and sutured.

After discharge from the hospital, swelling and pain in the calf of the right leg became severe and he was readmitted to the hospital suffering from a thrombophlebitis which was treated with anti-coagulants and elevation for an extended period of time. This plaintiff also suffered injury to the skin, muscle, tissue, fascia, underlying musculature and nerves in and about the affected areas and parts as well as severe shock to his nerves and nervous systems, with post-traumatic neurosis manifested by nervousness, anxiety, insomnia, paresthesia numbness of the lateral aspect of the right thigh and concern for the future.

All of the aforesaid injuries suffered by the plaintiff, James V. McLean, are permanent except those of a supuerficial nature.

The plaintiff, Ethel McLean, was and continues to be deprived of the consortium of her husband, including his services, society, support and companionship.

The plaintiff Joseph Linfante suffered severe and devastating injuries to his body. He suffered, amongst other injuries, a comminuted fracture of the left oscalcis; cerebral concussion; compression fractures of T-12 and L-1; multiple bodily contusions and lacerations. The comminuted fracture of the left oscalcis required closed reduction with Steinman Pin fixation. He had an abrasion over the right greater trochanter, and lacerations of the right upper arm and right lateral leg which required suturing. He had abrasions of the left elbow, contusions of the buttocks, contusions and abrasions of the right rib cage; and a contusion of the medial epi-condyle of the right elbow. He also suffered injury to the skin, muscle, tissue, fascia, underlying musculature and nerves in and about the affected areas and parts as well as severe shock to his nerves and nervous systems. He suffered and continues to suffer from post-concussion syndrome and anxiety hysteria neurosis, resulting in headaches, dizzy spells, nervousness, fear of height, tension, restlessness and uneasiness.

The plaintiff Susan Linfante has been deprived of the consortium of her husband, the plaintiff Joseph Linfante, including his support, services, society and companionship.

On the date of this occu. ence, the plaintiff James V. McLean was 55 years of age and had a life expectancy of 19.5 years and a working expectancy of 11.9 years according to the United States Department of Health, Education and Welfare, Public Health Service, National Center for Health Statistics, *Vital Statistics of the United States 1967, Vol. II-Sec. 5;* and the United States Department of Labor, Bureau of Labor Statistics, *Monthly Labor Review,* July, 1963.

At the time of this occurrence, the plaintiff Joseph Linfante was 32 years of age and according to the same tables, had a life expectancy of 38.2 years and a working expectancy of 30.4 years.

The plaintiff James V. McLean has sustained the following special damages to date, all of which are continuing:

(a) Hospital Expenses	$1,298.75
(b) Physicians' Services c.	450.00

(c) Loss of Earnings—from June 28, 1966 until September 5, 1967 at the rate of $220.80 per week or a total of $13,689.60; in addition, the plaintiff has been a temporary employee since resuming work and has worked at a reduced wage scale and has suffered further and additional loss of income since resuming work.

Additionally, this plaintiff has a permanent continuing expense in that he is required to wear surgical elastic stockings.

The plaintiff Ethel McLean was forced to give up the job she was holding at the time of the occurrence at a substantial loss of salary and benefits.

Additionally, the plaintiff James V. McLean lost all of his union benefits including life insurance and hospitalization, the cost of which he had to assume personally.

The plaintiff Joseph Linfante has sustained the following special damages to date, all of which are continuing:

(a) Hospital Expenses	$1,091.17
(b) Physicians' Services c.	700.00

(c) Loss of Earnings—totally disabled from June 28, 1966 until February 20, 1967; during this period of total disability, he lost $7,654.40 in earnings.

3(c). The defendant Gulf Oil Corporation contends that the premises were occupied by the defendants Joseph James, Inc. and Joseph James beginning July 1, 1965 and up to the date of the accident, June 28, 1966, that this defendant entered into a contract with the third-party

defendant Beaman Corporation whereby Beaman was to perform certain work in connection with the installation of perimeter light at the service station at the above mentioned premises; that third-party defendant Beaman subcontracted the entire construction portion of its contract with Gulf to the third-party defendant United Porcelain Co., Inc.; that the defendant Gulf Oil Corporation is guilty of no active negligence in connection with this accident and if there is any possibility of vicarious liability attaching to this defendant, Gulf Oil Corporation, said defendant is in a position to be indemnified pursuant to the cross-complaints against Joseph James, Inc. and Joseph James and by reason of the third party complaint against Beaman and United Porcelain Co., Inc., both by reason of active and passive negligence and by reason of the provisions of their contracts. This defendant further contends that the plaintiffs were guilty of contributory negligence in that they placed their weight upon a structure which they improperly fastened to the building at the aforesaid premises without properly testing the ability of the structure to maintain their weight, and without properly fastening the said structure, and further placing themselves in a position of danger without proper safeguards.

Defendant Gulf denies all supervision, direction and planning in connection with any work undertaken at the aforesaid premises, ad denies control of said premises.

Defendants Joseph James, Inc. and Joseph James contend that they had nothing to do with the maintenance or installation of the things which caused the plaintiffs' accident and that, in any event, the plaintiffs were contributorily negligent in working the way they did, in drilling holes through the brick and mortar of the wall which fell, and in failing to use scaffolding, and in climbing out onto the overhang carrying a weight of 70 lbs. These defendants further contend that all planning, building and construction of both the building and overhang were by defendant Gulf Oil Corporation, third party

defendant Beaman Corporation and third party defendant United Porcelain Co., Inc. and that even if there be negligence on the part of Joseph James, Inc., such negligence was passive, while the negligence of defendant Gulf Oil Corporation and third party defendants Beaman Corporation and United Porcelain Co., Inc. is active and affirmative, and thus judgment on the cross-claim in favor of Joseph James, Inc. and Joseph James against Gulf Oil Corporation, Beaman Corporation and United Porcelain Co., Inc. should be granted.

The defendants L.P.W. Realty Corp. and the representative of the estate of Lawrence Paul Wolf contend that defendant L.P.W. Realty Corp. owned the premises and leased them on April 1, 1967 to defendant Gulf Oil Corporation; that defendant Gulf Oil Corporation was not permitted in accordance with the terms of this lease to make any additions, alterations, replacements or improvements to the building without first obtaining written consent of the landlord and that such consent was never obtained; that if there was any negligence, it was on the part of the lessee and its subtenants and that the defendants L.P.W. Realty Corp. and the estate of Lawrence Paul Wolf are entitled to indemnity both in law and pursuant to the terms of their lease.

The third party defendant Beaman Corporation contends that it has no obligation to indemnify the third party plaintiff Gulf Oil Corporation and that any injuries sustained by the plaintiffs were not occasioned by any negligence of this third party defendant. This defendant contends that defendant Gulf Oil Corporation is guilty of active negligence. This defendant further relies upon the contract between it and the co-third party defendant United Porcelain Co., Inc. pursuant to which Beaman Corporation is entitled to indemnity from the aforesaid co-third party defendant.

The third party defendant United Porcelain Co., Inc. contends that it is not liable to indemnify the defendant and third party plaintiff Gulf Oil Corporation and

further contends that the injuries sustained by the plaintiffs herein were not occasioned by any negligence on its part and that the conduct of the third party plaintiff precludes indemnity.

4(a). The exhibits which each party now expects to offer at the trial are those identified in this Order; should any party hereafter decide to offer additional exhibits, prompt notice of that fact shall be given to each other party and to the Court by serving and filing a Supplemental Pre-Trial Memorandum.

(b) Copies of hospital records may be offered into evidence if authenticated by a letter or other certificate which purports to be that of the custodian of the records who certifies that the copy is true and complete. More formal proof of the authenticity of the records is waived.

(c) The parties agree that the following documents which were marked for identification or which are otherwise identified in the Order are authentic and may be received in evidence. Each party reserves the right to object to the materiality or relevancy of each document preceded by the letter "A" and each party reserves the right to object to all or a portion of each document preceded by the letter "B" on the ground that it is inadmissible under the hearsay rule.

Plaintiffs' Exhibits

1. Birth certificates of the plaintiffs herein;

2. Photographs;

3. Hospital records;

4. Bills and other proof evidencing the special damages previously indicated;

5. Marriage certificates;

6. Lease agreement between L.P.W. Realty Corp. and Gulf Oil Corporation;

Pre-trial Order

7. Lessee-Dealer responsibility for service station maintenance, dated July 1, 1965;

8. Gulf lessee-dealer checklist;

9. Gulf Oil Corporation rental schedule, flat rent-advance payment, dated July 1, 1965;

10. Entire group of documents marked as plaintiffs' exhibit 5 for identification at deposition held on June 18, 1970;

11. Entire group of documents marked as plaintiffs' exhibit 6 for identification on June 19, 1970;

12. Service Station Lease between Gulf Oil Corporation and defendant Joseph James, Inc.

Defendants' Exhibit

1. Employment records.

5. The parties agreed that the witnesses whom each party now intends to call, along with the specialty of experts to be called, are those listed in the memorandum heretofore filed pursuant to local Calendar Rule 13(b) iii (h). Should any party hereafter decide to call any additional witnesses, prompt notice of their identity shall be given to each other party and to the Court by serving and filing a Supplemental Pre-Trial Memorandum.

6. The parties do not agree to any limitation of expert witnesses.

7. The parties also agreed on the following matters:

(a) Plaintiffs at this time expect to require 3 trial days.

Defendants at this time expect to require 3 trial days.

8. The issues in this case are as follows:

(1) Was any negligence on the part of defendant Gulf Oil Corporation a proximate cause, in whole or in part, of the alleged accident?

(2) Was any negligence on the part of the defendants Joseph James, Inc. and/or Joseph James a proximate cause, in whole or in part, of the alleged accident?

(3) Was any negligence on the part of defendants L.P.W. Realty Corp. or the Estate of Lawrence Paul Wolf a proximate cause, in whole or in part, of the alleged accident?

(4) If the defendant Gulf Oil Corporation was negligent, is this defendant entitled to indemnity from either of the third party defendants or from co-defendants Joseph James, Inc. and Joseph James?

(5) If the defendants Joseph James, Inc. and/or Joseph James were negligent, are these defendants entitled to indemnity from the co-defendant Gulf Oil Corporation or from either of the third party defendants?

(6) If the defendants L.P.W. Realty Corp. and/or Lawrence Paul Wolf were negligent, are these defendants entitled to indemnity from co-defendant Gulf Oil Corporation?

(7) Were either of the plaintiffs guilty of contributory negligence?

(8) What are the plaintiffs' special damages, if any?

Dated: New York, New York
October , 1971

So Ordered: , 1971

U. S. D. J.

Consented to:

EMILE Z. BERMAN and A. HAROLD FROST
By: _____
Attorneys for Plaintiffs

Consented to:

FUREY, MOONEY & HENGEVELD
By: _____
Attorneys for Defendant
Gulf Oil Corporation

Consented to:

I. LOUIS WINOKUR, Esq.
By: _____
Attorney for Defendants
L.P.W. Realty Corp. and Lawrence Paul Wolf

Consented to:

WOLFMAN & STANGER, Esqs.
By: _____
Attorneys for Defendants
Joseph James, Inc. and Joseph James

Consented to:

COPPOLA & D'ONOFRIO, Esqs.
By: _____
Attorneys for Third Party Defendant
Beaman Corporation

Consented to:

ALEXANDER, ASH, SCHWARTZ & COHEN, Esqs.
By: _____
Attorneys for Third Party Defendant
United Porcelain Co., Inc.

EXCERPTS FROM TRANSCRIPT.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINAFANTE and SUSAN LINFANTE, Plaintiffs vs. L.P.W. REALTY COMPANY, et al., Defendants.	Before: HON. WHITMAN KNAPP, District Judge and a Jury
GULF OIL CORPORATION, Defendant and Third Party Plaintiff, vs. BEAMAN CORPORATION and UNITED PORCELAIN CO., INC., Third Party Defendants.	67 CIVIL 4959

New York, February 7,8,13, 1974
February 14,19,20, 1974

STENOGRAPHER'S MINUTES

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------X

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE and SUSAN LINFANTE,

Plaintiffs,

-against-

L. P. W. REALTY COMPANY, LAWRENCE PAUL WOLF, GULF OIL CORPORATION, JOSEPH JAMES, INC., and JOSEPH JAMES,

Defendants.

67 Civ. 4959

----------X

GULF OIL CORPORATION,

Defendant and Third Party Plaintiff,

-against-

BEAMAN CORPORATION and UNITED PORCELAIN CO., INC.,

Third Party Defendants.

----------X

B E F O R E:

HON. WHITMAN KNAPP,

District Judge
and a Jury

New York, N. Y.
February 7, 1974

A P P E A R A N C E S :

BERMAN & FROST, ESQS.,
Attorneys for Plaintiffs,
BY: MARVIN B. AUSUBEL, ESQ.,
HOWARD M. GOLDSTEIN, ESQ.

I. LOUIS WINOKUR, ESQ.,
Attorney for L.P.W. Realty, Lawrence Paul Wolf,
BY: PHILIP ADELMAN, ESQ.

FUREY & MOONEY, ESQS.,
Attorneys for Defendant and Third Party
Plaintiff Gulf Oil
BY: RAYMOND J. FUREY, ESQ. (on second day: JAMES FUREY, ESQ.

A. ALLEN STANGER, ESQ.,
Attorney for Defendants James
BY: SAMUEL BRILL, ESQ.

SCHAFFNER & D'ONOFRIO, ESQS.,
Attorneys for Third Party Defendant Beaman
BY: WILLIAM A. DUBROWSKI, ESQ.

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.,
Attorneys for Defendant United Porcelain
BY: IRWIN H. HAUT, ESQ.

* * *

(A jury of twelve was duly impaneled and sworn.)

(In open court, jury present.)

THE COURT: In a moment I am just going to ask the clerk to take you into the jury room so that you can acquaint yourselves with the way you go from here on. In the meantime just let me tell you what's going to happen next.

In the first place, the first thing that will happen is that counsel will open and they will tell you what their respective positions are and what they intend to prove. I just want to caution you about one thing. Nothing that is said by counsel or by me counts as far as what the evidence is. Counsel will tell you what they expect to prove. That is kind of like a brochure. It doesn't mean anything unless it is followed up by evidence. I will make comments on the evidence in the course of rulings that I make. I may say, "Well, that has been testified to," or, "That has been testified to and therefore such and such a ruling follows." That doesn't count, as far as you are concerned. You don't pay any attention to what anybody says about the evidence except the witnesses.

What counts in the case is what the witnesses

say or, more particularly, what you believe of what the witnesses say. That is the evidence and that is what you act on. What I say about the evidence has nothing to do with anything and you shouldn't let it influence you in any way, shape or form. There is a reason for that, among other things. In the first place, that is your job and it is not my job. But beyond that, I listen to what the witnesses say for an entirely different purpose than you do. You listen to it to decide whether they are talking truthfully or not. I listen to it solely to keep track of what has been said, because my rulings are based on testimony, and that is what the witnesses said, regardless of whether anybody believes it or anybody doesn't believe it. If certain things are said, that is testimony, and the absence or presence of testimony controls my rulings.

Evidence is what you act on, and evidence is what you believe of what has been said, which may be entirely different from what has been said. So I may be acting on an entirely different framework from what you are acting on, which is just another illustration of why you shouldn't pay any attention to what I say about evidence or what you may think I think about it, because I may be basing my thoughts, if I have any, on an

entirely different set of facts than you are basing yours on.

We'll take a brief recess while you acquaint yourselves with the jury room and counsel organize themselves.

(Recess.)

* * *

(In open court, jury present.)

THE COURT: You may proceed.

MR. BRILL: Your Honor, may we ask that the openings be recorded.

THE COURT: Yes.

MR. AUSUBEL : May it please the Court, Judge Knapp, my adversaries too numerous to enumerate, and Mrs. Paris, you, madam, and gentlemen:

I know that some of you have never had the benefit or the burden of sitting as jurors before this. His Honor has told you something about what we are about to do at this point. It is called the opening statement. It is the lawyer's opportunity to outline for you what he intends to prove in this case. I think I can say with some assurance that neither I nor any of my adversaries, lawyers representing clients, claim to have any personal knowledge of any of the facts which

concerned this accident that occurred back on June 28, 1966, nor do we claim to have any personal knowledge of any of the areas of injury or damage which are claimed to have been sustained by the two gentlemen here, Jim McLean and Joe Linfante, and, for what we now recognize in New York, the consequential damage to their wives, who are also plaintiffs in this case.

Notwithstanding the fact that we don't claim to have such knowledge, it seems to me that this opportunity that the law affords us is an important one for both of us. Because it would perhaps permit you as you hear testimony to follow the proof more easily. Witnesses don't always fall into a logical pattern. Doctors are sometimes taken out of turn. Perhaps with the benefit of these opening statements you will be able to follow the evidence more clearly, particularly in the light of the contentions and the issues of the various parties.

There is a further factor here. Although we are not witnesses, each lawyer--and there is no great mystery to this--has a responsibility, once he is retained, to collect or marshal the evidence. That means in a case such as this to secure official reports that were prepared and there were indeed official

reports that were prepared in connection with this accident. Police were summoned to the scene of this accident, which was at 116th Street and 8th Avenue in Manhattan. They investigated the accident. The Emergency Service Department of the New York City Police Department was there. Official reports were prepared in accordance with the regular practices of the New York City Police Department, which became public records and official records and represented the observations of these people who partook in the investigation.

There were photographs that were taken. There were hospital records concerning people who were hurt in this accident and there were doctors' reports and there are employment records. All of that has been available to the various litigants in this case. So we are not altogether strangers with respect to this suit.

Then once the suit was commenced in this court, and it has been pending for some years, each of us had the opportunity of taking testimony, what we call depositions. In this particular case there were nine depositions taken of various persons who in some way or another were related to the various parties to this case. When I say depositions, I mean that people were sworn to tell the truth. Under the adversary system each of us

had an opportunity to examine and cross examine. A great deal of that will be read to you, I assure you, throughout the course of this trial. I apologize to you in advance. It is perhaps not the most exciting way to present proof, but it is one of the recognized ways and in some instances absolutely key to the presentation of a case. Witnesses have a tendency to move. At least in one instance one witness has since died. If we didn't have the benefit of these books, we couldn't present it to you. To some extent we are relying, at least in my case, upon this kind of evidence that has been marshaled and collected before we came into this courthouse.

With that in mind, permit me to tell you that this accident, as his Honor indicated to you in brief form, occurred on June 28, 1966--that is more than seven years ago, seven and a half years ago--at the northwest corner of 8th Avenue and West 116th Street here in Manhattan. You have already heard that it occurred at a Gulf Service Station. It occurred when two workmen, sheet metal workers, who were working in and about a roof for a sub-contractor by the name of United Porcelain, while doing their work--and I will go into great detail about that--this roof, in accordance

with what we say to you was the custom and practice recognized in their trade, two experienced workmen, when a portion of a roof and an overhang collapsed as a consequence of which they were precipitated, thrown downward, and injured.

Before I go into the details of the accident, I must tell you something about the background to the work that they were undertaking and to this accident.

It was back, at least we know as far as the testimony is concerned, in 1955, which was some 11 years before this accident, that a corporation known as L.P.W. Realty Corporation, which then apparently had as one of its dominant figures a gentleman by the name of Lawrence Paul Wolf, purchased a building located at the spot where ultimately Gulf was to operate a service station. Apparently Mr. Wolf had some arrangements with the Gulf Oil Company whereby he would build, on behalf of Gulf, Gulf Service Stations. Following the construction of these stations, he would lease out the service station under a written lease, which provided in this particular case, I think it was perhaps the tenth such arrangement that he had with Gulf, it provided for a rather long-term lease, some 20 years, with an option on the part of Gulf

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to renew it for an additional ten years, with a further option to purchase the building. It was built in a perhaps standard light, but in any event with Gulf's permission and at Gulf's request, and it was built some two years after purchase by Mr. Wolf's corporation, in 1957, sometime in the spring of 1957.

The building as built came with a roof which was located on top of this structure, which had as part of the roof a wall which has been variously described as a parapet, with a cornice or a coping, all of this made with the consistency with the material that roofs are supposed to be made of ostensibly, some 12 inches in thickness, (indicating), and running several feet above the level of the roof proper, all part of that structure.

At the time when this lease was entered into in 1957, in April of 1957--at least that is the effective date of the lease--there were several provisions of that lease which are of some critical importance in this case. I am not going to focus on all of the legal verbiage in that agreement. Among other things it provided in essence that the owner of the premises would in essence turn over the building under what it calls a triple net lease, with Gulf paying the rent and taxes and other things.

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There was a very important provision which was directed to our attention in the testimony of Mr. Wolf in which no modification, alteration, repair or improvement was to be made to this structure by Gulf without first having previously obtained from the landlord written consent. The landlord in testimony has advised us that no consent to modification of this roof would have been given unless it had made previous inspection of the proposed work and was satisfied that it was safe and consistent with contemplated work.

That was what I tell you are some of the salient, important features of this rather extended document which was entered into between the owner of the building and Gulf Oil Corporation, which then took it over.

From that point on, the owner claims that at no time did it arrange to have any inspections, any maintenance, any repairs made with respect to this building, and particularly in connection with the roof or the parapet or the coping.

Then Gulf took over, and apparently Gulf had some practice and arrangements whereby Gulf itself, not in its own name, would operate this or other service stations, but on the contrary it would then enter into a

written agreement with some other corporation or individual--

MR. FUREY: Your Honor, I am going to object at this time to any categorization of Gulf's activities. The opening statement is designed to show what you intend to prove, not on the apparent practices--

MR. AUSUEEL : I intend to prove that, your Honor.

THE COURT: I assume he intends to prove the practice that he is talking about. But bear in mind what I said to you: If he doesn't prove it you disregard what was said.

MR. AUSUBEL : Apropos of that, your Honor, I propose to read to you from various testimony, and I think I indicated to you that I am relying upon that kind of proof.

In any event,there came a time--and we'll show you what their practices were; there was testimony taken of three of their Gulf officials. They indicated what their practices were and who were the personnel that had relationships with the service station involved.

In that connection let me tell you--and we intend to prove this--that Gulf had entered into

agreements with franchises, and finally on July 1, 1965, which was a little more than a year before this accident, it entered into a written agreement with a corporation known as Joseph James, Inc. That agreement was to last for one year, that is, from July 1, 1965, to June 30, 1966. It too had some provisions which have some relevancy to the issues in this case. For one, Mr. James' corporation had no right to make any modifications or alterations to the premises without first having secured Gulf's consent. Mr. James, under the agreements that were then entered into, was required to purchase all of his fuel oil and other products from Gulf, required to display the Gulf emblem and Gulf pumps. You will hear the testimony that it was not he but Gulf who would send down sales representatives and they were the ones, he claims, and they accede, who were required to make inspections of the premises and required to make structural repairs when they were necessary and to pay for them. This is testimony that has been taken and recorded. Mr. James has indicated that at no time did he ever inspect, during his tenure, the roof or the coping or the cornice of the premises.

Gulf claims that regular reports are supposed to be made out whenever inspections are made

of the premises. We'll show you that at no time before this accident, which occurred on June 28, 1966, that at no time between the time it entered into that agreement with the owner of the premises, L.P.W., on April 1, 1957, right up to the date of this accident, either before or after the decision was made for certain work which was involved here, did Gulf ever have a report of a single inspection having been made by anybody on its behalf or otherwise of the roof, the coping, or the parapet on this building.

In any event, it came about in December of 1965, some six or seven months before this accident, early in December, when the real estate department of Gulf decided on a modernization program and specifically with respect to this service station which was located at the corner of Broadway and 116th Street.

MR. ADELMAN: 8th Avenue.

MR. AUSUBEL : 8th Avenue. Excuse me. I made a mistake as to this. But the location is the same and the building is the same. 8th Avenue and W.116th Street.

After this decision was made to modernize the station, they intended, Gulf, that there be three areas of improvement. One was that they put in a new kind of

facing, a porcelain facing, and that they put in a new aluminum roof or overhang which would extend out from the parapet proper; and that in the trailing edge of this new aluminum roof or overhang they would put in new lighting, give it a newexterior. They did not indicate that they wanted any alterations or structural repairs made to the building but simply what they thought would improve the outward appearance and decoration of that structure.

That decision was made in December of 1965 by Gulf.

This wasn't the first time that the Gulf organization had embarked upon that kind of program. You will hear from the evidence how they had a standard arrangement with a North Carolina company known as Beaman, Beaman Corporation of Greensboro, North Carolina.

MR. DUBROWSKI: Your Honor, at this point I would like to object to any reference by the plaintiff to any corporation. He didn't sue my corporation; Gulf did. I am a third-party defendant, not a defendant, your Honor.

THE COURT: It may be relevant to his case against Gulf, for all I know.

MR. DUBROWSKI: All right, your Honor.

MR. AUSUBEL: It is quite true we did not sue Beaman and we don't sue Beaman, but it is important, it seems to me, for me to tell you about how it came about that we undertook the work and under what circumstances we undertook it.

Beaman Corporation had a regular and standard arrangement with Gulf. They had had this standard arrangement at least since 1964. And the standard arrangement was that when Gulf decided on one of these projects, what they called an economy conversion, Gulf would transmit a written communication to Beaman for this project. Beaman was Gulf's contractor or sub-contractor. Gulf's architect was the one who would prepare the plans and the specifications. After the paperwork would be accomplished, then orders would be given by Gulf to Beaman under the standard arrangement that they could commence upon the work. Beaman, however, while it was hired for both labor and materials, did not have a labor force in the New York City area. And so Beaman sub-contracted out, again under a standard arrangement, with the United Porcelain solely to furnish certain aspects of labor in connection with the economy conversion which was ordered by Gulf and issued to Beaman.

I hope I haven't overpowered you with the

names, but it seems to me it is important to describe to you the change of companies and how it came about that this work was undertaken in June of 1966 by these two men.

Following this practice, I think I mentioned to you the decision was made in December by Gulf's real estate department, and thereafter, less than a week later, a written order was submitted by Gulf to Beaman alerting them to the prospective job. This entailed that Beaman furnish prefabricated materials, which includes this roof or overhang, which included certain brackets, which included rivets and other materials that ultimately would be worked upon by laborers who were in the New York City area.

Among other things, Beaman would also transmit to the job site, to the service station directly, once the order had come through and once they were ready to do the work, a lighting plan. And that was the only plan or document that was furnished by Beaman to United Porcelain employees who would come to the job site.

Between December 1965 and June 1966, it was Gulf and Gulf alone who had made the arrangements for this renovation, and it was Gulf's various departments who were supposed to do the checking; it was Gulf who was

supposed to secure the landlord's consent.

MR. FUREY: I am going to object to any allegations about what we are supposed to do. This is in the form of a summation, your Honor.

MR. AUSUBEL: I intend to prove it under the agreement, your Honor.

THE COURT: I assume what he means is that he intends to put in documents.

MR. FUREY: Showing what Gulf is supposed to do, your Honor? That is a form of summation, it is a conclusion; it is not a statement of any document.

MR. AUSUBEL: I contend it is in the document, your Honor.

THE COURT: Obviously the ultimate fact of what was supposed to happen and what wasn't supposed to happen--he is in shorthand telling you that he intends to offer documents which will support this. I think the jury understands it is not up to him what Gulf is supposed to do; it is up to you to decide what Gulf is supposed to do, based on documents offered.

MR. AUSUBEL: We'll show it to you from the agreements that were entered into and from the testimony that was taken in this case.

In any event, this was a long-standing practice

that had existed between these three companies -- Gulf, Beaman, United Porcelain -- and in turn its employees. As a matter of fact these two plaintiffs, Jim McLean and Joe Linfante, had worked on such sub-contracted arrangements on many, many occasions before this. The records indicate that Mr. McLean had some 75 similar jobs before this and Mr. Linfante 25 similar jobs before this, all involving service stations, all sub-contracted work out from Beaman.

We intend to show you that at no time before the work was undertaken in June of 1968 did Gulf ever secure the consent of the owner pursuant to the terms of this lease. And the owner claims it would not have consented unless prior inspection had been made.

THE COURT: I don't see how that is relevant.

MR. AUSUBEL: I think it is, your Honor. In any event, I intend to prove it.

Now, the first time that United Porcelain learned about this prospective job, again in accordance with the regular practice, was by a written communication which was sent out by Beaman, dated June 20, 1966, to United Porcelain. Some four days later, in accordance with that sub-contract and the regular practice that had evolved and the customs and practices that had evolved, United Porcelain dispatched two experienced sheet metal

workers, men who had been hired as sheet metal people through the union hall--Mr. McLean had been doing sheet metal work at least since 1950; Mr. Linfante had done it several years before. They had worked as a team on several jobs before this accident. I think it was around June 24, 1966, some four days before the accident, that these two men were sent by their employer, United Porcelain, to the job site.

When they came to the job site, they were furnished with certain tools; they also came with two what they call "A" ladders. They are eight-foot ladders with extensions. They were also given certain instructions with respect to their work.

When they got to the job site, Beaman had already sent up the prefabricated materials. They came equipped in cartons. They had already sent up the lighting plan that Gulf had apparently given to Beaman, which indicated where certain things were to be done in terms of plans of the building.

For one, these two employees were not permitted to interfere with the operation of the service station. Business was going on as usual during this alteration. And so they were required to get out of the way in the areas of the bays where this material had been

sent, to get this material--and some of it is quite bulky; for example, the lighting fixture weighs about 60 or 70 pounds, and you could only work from the roof side. Because if you decided to put up lights by walking up an 8-foot ladder and then with an extension, with an overhang outside, the slightest imbalance of movement by one or both employees would mean down would come the ladder, the extension, the light, and the people. So the regular practice was to put these lights and all the materials on the roof proper to permit for the continued operation of the service station during the progress of the work.

In any event, these men--

THE COURT: How much longer are you going to be?

MR. AUSUBEL: I think I can conclude in about ten minutes, fifteen minutes, your Honor. Do you want to recess now?

THE COURT: Ten minutes is a deadline. If you can't conclude it in ten, we might as well recess now.

MR. AUSUBEL: Then I think, your Honor, it would be appropriate to recess.

THE COURT: Ladies and gentlemen, our customary recess is from quarter of one until two. Actually we could have gone on, it is not immutable, but five minutes of one, for other reasons, I have to stop,

so we might as well stop now, as we can't finish in that time.

Bear in mind that this is what he expects to prove. As you gathered from objections that one or the other counsel have made, some of the things they may contend are irrelevant or immaterial, and I may rule they are not admissible. Just remember because they said it does not count. If it is admissible it does count. What they act on is, what the witness say is what counts, that is admissible.

Gentlemen, 2 o'clock return to the jury room. There may be other proceedings going on here. Return at 2 o'clock.

(The jury left the courtroom.)

THE COURT: Gentlemen, anything you want to say on the record before we adjourn?

MR. WINOKUR: Not on the record at this time, your Honor. I intend at the end of this opening to make a motion based on the plaintiffs' opening with respect to the defendant L.P.W. Realty Company.

THE COURT: All right.

MR. WINOKUR: I can give you a little preview.

THE COURT: Off the record.

(Discussion off the record.)

(Luncheon recess taken.)

AFTERNOON SESSION

2:00 P.M.

(In open court, jury present.)

THE COURT: You may continue.

MR. AUSUBEL: I think when I last spoke with you before the luncheon recess, I was giving you some of the background to the work that eventually was involved at the time of this accident. Just to put it into some context, I indicated to you that we intended to show you that at some week or so before this accident--I think June 20, 1966--that a written authorization was sent by Beaman to United Porcelain. From that point on, United Porcelain's function, which had nothing to do with drawing plans or testing buildings or general contracting or anything of that nature, or even supplying materials, United Porcelain's function was to supply labor, and specifically two sheet metal workers, who would install in this particular case the overhang--this aluminum roof that would jut out from the top of the old roof and parapet--as well as the underlying supports, as well as, after that was put in, the perimeter lighting, which would

go into the new roof at the trailing edge.

I also hope I made clear to you that when they were required to put these lights away from the bay areas, after delivery by Beaman to the job site, that those materials were then stored on the old roof in preparation for the work that was to take place during the ensuing days.

There did indeed come this day--I think it was around June 24, 1966, which was some four days before the accident--when Mr. McLean and Mr. Linfante had been assigned by their employer, United Porcelain, to the job site.

As I indicated to you, these were experienced sheet metal workers. This was not the first time they had ever been involved in this kind of work. Their work in no way involved any alterations to the existing structures.

They did come down and they did the work, as was customary and as they assumed to be proper and safe. They had gotten to that point on the job, on the fourth day of the job, on June 28th, when they had completely installed this overhang with the supporting structures. You will hear testimony from the people who fabricated those materials, who manufactured these materials or

arranged for their manufacture, Beaman, that if the building were sound, if the roof were sound, that this overhang had certain durability and strength with its supporting structures, including the brackets and these triangular supports and the rivets, in terms of both shear and tensile strength of considerable weights. It was designed to maintain certain loads on it, for example snow and ice, the people that would have to lean on it to change lights, etc., if the building were sound.

Mr. Linfante and Mr. McLean, on the afternoon of the 4th day that they were on the job, on June 28th, then had gotten to that portion of the job when they were going to put in the first lights, the perimeter lights, at the trailing edge of this new canopy, which was about 30 inches in length and extended from the roof coping of the building. And it was in the process of putting that on, about 2:30 P.M.-- and they will describe to you how they were accustomed to doing the work and how they followed that custom and practice of then attempting to put on this thing, after the overhang had been appropriately secured, with a board underneath to distribute the weight—when suddenly while the two of them were up on this roof, suddenly the canopy and the underlying part, the coping or cornice, as it is referred to,

of the roof, of the parapet, that portion of it collapsed, taking down the overhang at that part, taking them down and precipitating them down to structure or structures that were in the premises and eventually ground level.

When this thing collapsed, it didn't do them any good. I think the roof of this building was perhaps more than 10 feet above ground level, or at least 15 feet above ground level. The police repaired to the scene. You will hear and see how they managed to extricate these people. Eventually an ambulance came from Harlem Hospital and took both of these men to the hospital. Since it is one of the substantial areas of the case, I want to tell you a little bit about the proof of the injuries with respect to these two men.

Mr. McLean was found from this crush injury to have suffered some very serious injuries to his hard tissue, the bones in the body. The worst of the injuries was to the largest bone in the body, what's referred to as the femur--

THE COURT: You said the hard tissue.

MR. AUSUBEL: Yes, the hard tissue, the bony structure of the body, and the worst of the injuries was to the largest single bone in the body, in the

anatomy, which is referred to by the doctors and in medical science as the femur. It is the single bone that extends from the knee right up in the pelvis. They found on examination, and that included x-ray examination, which are photographs, to demonstrate any bony abnormalities or injury, they found that he had suffered what's referred to as a comminuted or comminuted fractures of his right femur. Comminuted, translating it into simple English, means that the bones were broken into many different fragments from this crush injury, from this fall.

In addition to having this injury to the right femur, which involves the thigh and the hip and which is a weight-bearing bone-- it's a significant bone in terms of the structure of the body-- he had a severe injury to the soft tissue of the opposite leg, the left leg. It was macerated, badly torn.

They also found that he had some internal injuries, which were demonstrated by blood which flowed in his urine, which is one of the clinical signs of internal bleeding. And he was in that hospital for 18 days, Harlem Hospital.

In order to try and do something about that badly shattered right femur, some two days after his

admission he underwent one of the most serious operations known to the orthopedic surgeons, known as an open reduction, an open operation, in which they inserted a rod with screws to try and put the various comminuted or broken fragments together to assist in the healing process.

I might say to you, to telescope this, that he has that hardware in him to this very day, and the probabilities are he will have it with him for the rest of his days.

They tried to repair the soft tissue injury in his left leg with stitches and other things, and they tried to manage his other problems in the hospital. I am not going to describe to you all of the other injuries, because I want to zero in on what obviously were the primary areas of damage and injury which affected this man and has affected the man in his normal life, in his work style, and in his enjoyment of living.

Following his discharge from the hospital, he developed some complications secondary to these injuries. It appeared that he developed a blood clot in the deep veins of the body, and this was a matter of some great concern to the doctors. I try to use these terms in terms that perhaps we are all accustomed to use it.

You will hear the medical terminology of a thrombophlebitis which is the technical term, but perhaps translated simply it is a blood clot and it is a very significant residual. It's a life-dangerous situation, and because of that, of his 12 days of discharge and because of the constant pain that he suffered, due to this injury and the clot that resulted from it, they immediately rushed him back to Harlem Hospital for life-saving measures and then undertook a regimen to try and remove the clot by accepted medical practices, which included the use of anti-coagulants.

I will not go through, because I don't think it is fair to you or anybody else, what kind of treatment he underwent following that accident. I just want to point out to you that as a result of these injuries he was out of work immediately following the accident continuously for more than 14 months, not earning a nickel during that period of time, and going to various doctors. This is a man whose livelihood depends upon--

THE COURT: They don't need to know all this to understand the case.

MR. AUSUBEL: All right. And during that immediate 14- or 15-month period of time he incurred

between loss of earnings, principally loss of earnings and hospital bills, and some medical bills, in excess of $15,000 in expenses.

You will also hear about what had been his residual problems since then, since his return to work. That is Mr. McLean.

Now I want to talk to you about his co-worker, who also was injured in this accident, Joe Linfante. Mr. Linfante too had a crush injury to his hard tissue. But in his case the comminuted fractures involved his left heel bone, which the doctors call the os calcis or the calcaneus. Whereas the femur transmits the weight downward, the heel bone transmits the weight upward. They are both involved with the weight of the body structure. So he had these fractures of the left heel bone.

He also apparently suffered, as a result of the accident and the crush injury, injuries to his spine, which were variously diagnosed in the hospital record as fractures, compression fractures, or in any event at least very serious strains and sprains and distortions of certain parts of the spine. He had multiple other soft tissue injuries, lacerations, which required stitches.

He was in the same Harlem Hospital for 11 days following the accident, and during which time he too underwent surgery, a reduction of this fracture of the os calcis, and in his case the procedure was for the insertion of a pin called the Steinman pin, apparently named after the doctor who originated it, again to hold these various broken fragments in place. And they casted his left leg and heel.

And he too went home and some few months later, in September, went back to a hospital closer to his home in New Jersey, St. Francis Hospital,where he was confined for an additional six days, during which time they operated upon him again to remove the hardware--which was not true, incidentally, in Mr.McLean's case. He still has that hardware in his femur.

He was out of work for about eight months following the accident, and his out-of-pocket expenses, principally again for loss of earnings for which he got no compensation, exceeded $11,000. These are the arithmetic losses.

What manner of men were these--

THE COURT: That is not--

MR. AUSUBEL: Very briefly I would like to just--

THE COURT: Yes.

MR. AUSUBEL: I intend to tell you what kind of men these are, their ages, their family status, what type of lives they enjoyed before this accident, in what ways their lives have been disturbed and distorted, what pain they have experienced, and will experience. I am not going to go into that in detail.

What is it that we claim here? We claim that we have two experienced workmen who were doing their work in accordance with good custom and practice following the plans that were submitted to them, when they were caused to be injured in this industrial accident on this roof due to this collapse; that the people who were responsible for their working there did not furnish them with a reasonably safe place to work and didn't take appropriate precautions for their safety, considering the work that was entailed, and that as a result of this accident and their carelessness in that regard that they were injured, they were damaged, and in due course we'll ask you to grant them redress, to right the wrong.

Some people suggest that there is an advantage to talking first. As for myself, I prefer to talk last. As far as my clients are concerned they are satisfied that you do what the law requires you to do and that is

to keep your minds open until you have heard all the evidence.

THE COURT: Ladies and gentlemen, that is the plaintiffs' opening. No doubt the defendants may have some motions to make, that don't concern you, so I will excuse you for a few minutes and send for you.

(The jury leaves the courtroom.)

THE COURT: I have heard your motion.

MR. DUBROWSKI: May I say something off the record, sir?

THE COURT: Yes.

You want this off the record?

MR. DUBROWSKI: No, sir. Mr. Ausubel, if you want to talk first in summation I will let you do it.

THE COURT: I heard your motion. What is the answer to it? Make your motion for the record.

MR. WINOKUR: At this time I move to dismiss the complaint, insofar as it relates to defendant L.P.W. Realty Corporation. The reason for this motion is that the plaintiff concedes in the opening statement that the premises were not under the control of this defendant. He concedes further that the work that was ordered for these premises was not ordered with the

knowledge or consent of this defendant. He concedes further that the happening of this accident resulted from the attachment of the substantial weight to the parapet or the coping.

So that there is no contention, number one, that the building was improperly constructed. There is no contention that the landlord ordered this work or supervised it or had any control over the work or even knew about it. In fact, the plaintiff, Mr. Ausubel, stated to the jury that the tenant was supposed to apply for written permission before this type of work was to be done and that no such permission was given, and that had request been made for such consent there would have been inspection to determine whether this work could safely be done in the manner that it was proposed to be done.

So under those conditions I submit that there is no possible claim which the plaintiff can have against this defendant.

The plaintiff asserts that possibly there may be vicarious liability on the part of this defendant on the theory that under section 200 of the Labor Law this defendant is obliged to supply a safe place to work for a stranger whom the defendant doesn't even know is going to work or had no reason to believe was going to work.

I have checked that section and I have checked the annotations under that section. I call your Honor's attention to a very recent case, 1972 Appellate Division case. The citation is 38 A.D. 2d 746. The case is Reynolds against Brody. In that case it is clearly stated that this obligation to furnish a safe place to work applied only to somebody who orders the work or retains supervision and control over the work or who has the power to see to it that the work is properly done.

THE COURT: What's the citation, again?

MR. WINOKUR: 38 A.D. 2d 746.

THE COURT: Do you happen to have the New York Supp?

MR. WINOKUR: Yes. 329 N.Y.S. 2d, page 824. I think that case is a complete answer to any claim of vicarious liability. That is not the only case but that one is the latest that I have been able to find.

MR. HAUT: May I suggest that Shepard be referred to in this case. I have the distinct recollection that there was an appeal. I don't remember, sir, whether it was from the Supreme Court to the Appellate or the Appellate to the Court of Appeals. But if your Honor does look at the case I would suggest that you just

Shepardize it to see if it hadn't gone up.

MR. WINOKUR: It was in the 1973 pocket supplement.

MR. HAUT: I only mention that because counsel has only looked at the annotations.

MR. WINOKUR: I looked only at the annotations, but there must be other citations. Even in cases where the landlord was in possession of a part of the building, the landlord was responsible for only the part over which he retained possession but not over a tenant's part.

THE COURT: Let me hear the other side.

MR. AUSUBEL: If your Honor please, at this point, of course, the motion is being made, and it is, I might say, quite unusual.

THE COURT: I know it is unusual, but you made the explicit statement that you would prove that this owner had no control over the premises.

MR. AUSUBEL: I said that I would prove through depositions that that was the owner's contention--

THE COURT: You said you would prove those facts.

MR. AUSUBEL: Yes. And I intend to prove, by reading the owner's--

THE COURT: I don't care how you intend to prove it. Do you intend to prove those facts?

MR. AUSUBEL: I intend to prove that the owner had a lease and that under the terms of the lease there were the various terms that I denominated. Insofar as the exclusivity of control, that is an issue between Gulf and the owner.

THE COURT: You have a cause of action against this person?

MR. AUSUBEL: Yes.

THE COURT: How do you intend to establish that cause of action? That is all I want to know. I don't care what happens between him and Gulf or anybody else. How do you intend to establish that cause of action on the basis of what you have told us?

MR. AUSUBEL: Yes, I intend to establish that cause of action, first through the terms of the lease--

THE COURT: How does that establish the cause of action? In the first place, do you quarrel with his statement of the law, which is that in order to hold his client liable you have got to show that his client had some control of the premises?

MR. AUSUBEL: Yes, I do quarrel with it.

THE COURT: How do you quarrel with that?

MR. AUSUBEL: I say his client as an owner had a nondelegable duty when--

THE COURT: You say that. What section or case do you cite? Because my review of the law is just contrary.

MR. AUSUBEL: I am relying upon several cases. Would you like me to set them forth?

THE COURT: I want to hear them, because I agree with his statement of the law. Now, I want to be shown that I am in error if I am.

MR. DUBROWSKI: Your Honor, may I interject here. As I understand it from the opening, L.P.W. built this piece of property, the gasoline station, and one of the contentions is whether or not this cornice or parapet was sound. That is what I heard.

THE COURT: What has that got to do with this dispute?

MR. DUBROWSKI: I think it has much to do with it.

MR. AUSUBEL: But, look, a third party defendant--

THE COURT: What?

MR. AUSUBEL: I was eventually going to address myself to that point, but you asked me specifically

about the provisions of section--

THE COURT: We are now addressing ourselves to your suit against the owner and nothing else.

MR. AUSUBEL: Yes. In terms of the cases that I am relying on, I will refer your Honor's attention to Wolfram against Brooklyn Edison Company.

THE COURT: Is that in your plaintiff's trial memorandum?

MR. AUSUBEL: Yes, your Honor, I would just be regurgitating the various authorities that I--

THE COURT: Just tell me the page.

MR. AUSUBEL: Pages 7, 8, 9 and 10.

THE COURT: Wolfram against Brooklyn Edison.

THE COURT: In Wolfram it says, "In this case all defendants had constructive notice of the dangerous condition that existed with respect to the roof coping." Right away you distinguish--do you have any evidence that--what are we talking about?

MR. ADELMAN: L.P.W.

MR. AUSUBEL: L.P.W.

MR. WINOKUR: There is no claim that anything was defective as far as the coping.

THE COURT: Yes, that L.P.W. had any constructive notice.

MR. AUSUBEL: That is the whole point.

THE COURT: I am asking you--

MR. WINOKUR: But do you--

THE COURT: Please. I am asking you, do you claim it, and, if so, how do you square it with what you said on your opening?

MR. AUSUBEL: I intend to prove that--

THE COURT: Would you answer my question, please?

MR. AUSUBEL: The answer is yes.

THE COURT: How do you intend to prove he had constructive notice?

MR. AUSUBEL: I intend to prove they had constructive notice, because this work was contemplated for some six months before the accident.

THE COURT: But you told me that he had contracts, he had a net-net lease.

MR. AUSUBEL: Yes.

THE COURT: He had contracts that they were not to do this kind of work.

MR. AUSUBEL: Yes.

THE COURT: And no one told him that they were going to do it.

MR. AUSUBEL: Yes.

THE COURT: How does he have constructive notice of what happened in defiance of all those contracts?

What obligation do you contend the law had on him to supervise the work and find out what was going on?

MR. AUSUBEL: I don't contend that he had an obligation to supervise.

THE COURT: Then how do you contend--

MR. AUSUBEL: Your Honor, I tried to address myself specifically to the question. You asked me about constructive notice.

THE COURT: Yes.

MR. AUSUBEL: And that is the position I took.

THE COURT: But I am asking you how can you possibly make that contention in the light of what you say you are going to prove? I am not asking you about ethereal cases; I am asking you about this case. You have told me you were going to prove that this owner had a net-net lease, he was out of possession, he had a contract specifically prohibiting this, he never inspected. So far as you have told me he had no obligation to inspect. Therefore, how has he got constructive notice of what was being planned for six months?

MR. AUSUBEL: I can't articulate it any better. I have no evidence other than what I have just

indicated.

THE COURT: Then you have no evidence on that issue.

MR. HAUT: Your Honor, may I be heard on that point?

THE COURT: What do you have to do with this argument?

MR. HAUT: I have nothing to do with it but--

THE COURT: Then don't speak to it. Then it is immaterial that he wasn't warned because he did not have constructive notice so he had no obligation to warn.

MR. AUSUBEL: I don't want to engage in that.

THE COURT: You have to engage. That is what you are here for. You have brought a cause of action against this defendant. He has stated to me quite reasonably, it seems to me, that on the assertions you have made in your openings you have no cause of action. Now I am going to dismiss it unless you can show me that I am wrong.

MR. AUSUBEL: I am only going in on the theory as to the owner, that he had a nondelegable duty.

THE COURT: Where do you find that theory?

MR. AUSUBEL: I tried to indicate to you the

cases. If I am in error, then your Honor will dismiss it.

THE COURT: And then I will be in error, maybe. But I am trying to get you to show mw why you think so. You have shown me one case that has nothing to do with nondelegable owners; it has to do with something that you are supposed to do when you have notice of something. Show me a case that deals with a nondelegable duty.

MR. AUSUBEL: Well, I referred your Honor's attention; if they are not in point, then that is my position. I hope your Honor doesn't take offense at it.

THE COURT: I don't take offense; I just act as though I did.

MR. AUSUBEL: The Soterman case, which is at page 7, and the Siegal case, which is at page 8.

THE COURT : Who are the defendants in the Soterman case? Are they an owner who didn't know anything about what was going on? The Siegal case states bank failed to inspect. We have established this owner has no duty to inspect.

MR. AUSUBEL: I didn't say that in my opening. What I said was that the contract specifically provided that they were supposed to get the consent. I didn't say that they didn't have a duty to inspect.

THE COURT: I know, but it follows from what you said, unless you can show me some duty to inspect in the law, some duty to inspect premises you have given off on a net-net lease and you reserve no control and it is specifically contracted with the owner to let you know he is going to do anything and he doesn't let you do anything, I am not aware of any duty that the law gives you as to that. In Gasparino it is clear, under 200, that the owner-occupant of a building--well, of course the owner-occupant, but that is not what we are dealing with here.

MR. AUSUBEL: Well, I don't know--

THE COURT: Mr. Winokur--

MR. AUSUBEL: The other aspect--I am going to try to answer your question specifically--and other than the cases I have indicated, I would have to review it to find specifically whether in any of those cases the owner was in a comparable position to this owner, that is, under a triple net lease an absentee owner with this kind of contractual provision. I am frankly not prepared to address myself to that at this moment. I didn't anticipate a motion being made at the opening.

THE COURT: You are Mr. Winokur?

MR. WINOKUR: Winokur, right.

THE COURT: If I get reversed, it is no skin off my nose. It will be a bother to you. Do you press your motion?

MR. WIOKUR: Yes, I do, your Honor.

THE COURT: Motion granted.

MR. FUREY: Your Honor, I didn't want to interrupt. May I address myself to that point?

THE COURT: Do you have an interest in whether this motion is granted?

MR. FUREY: Yes, I believe so, your Honor.

THE COURT: All right.

MR. FUREY: I thought, I was under the impression --correct me if I am wrong--that the allegation was that there was a defect in the building, and if there is a defect in the building, it was under the control of L.P.W. Realty and Gulf as transferred down to Joseph James. I thought that was the question of fact.

THE COURT: How is that under control of L.P.W. Realty when L.P.W. Realty has given a lease to Gulf?

MR. FUREY: I am sorry, I didn't hear you.

THE COURT: How is it under control? In the first place, there is no allegation that I have heard that ordinary building is wrong; it's only that the building

wasn't properly constructed to have this overhang put on it.

First, what legal interest have you got as to whether L.P.W. Realty gets a judgment against it or whether it doesn't?

MR. FUREY: I was under the impression, your Honor, that the contention on the part of the plaintiff was that the wall or coping was defective, and I thought that was part of the original make-up, performed by L.P.W. Realty.

THE COURT: First answer this question, because if you answer this question in the affirmative, I will reserve decision until Mr. Mooney, is it, has an opportunity to be here. How does Gulf have a legal interest? Suppose the plaintiff wanted to withdraw against Gulf at that point, would you have any standing to stop him?

MR. HAUT: Your Honor, that was the point I wanted to speak to, if I might, though I am not Gulf and I am not L.P.W.

THE COURT: You look a lot like Gulf to me.

MR. HAUT: But the young gentleman here is not that familiar with the case as some of us are.

THE COURT: That's right.

MR. HAUT: And that was exactly my point, sir, which I wanted to make. The issue here, as I understand it, one of the major issues, is the shifting of responsibility between L.P.W. and Gulf. In that sense we are involved also, because each of those defendants is saying, "It wasn't our responsibility."

May I just be heard, sir? So that L.P.W. is saying in effect, "We didn't have to inspect this because Gulf had to do it." But Gulf is saying the same thing, "It was L.P.W.'s or else it was the people at this end of the table--James, Porcelain or Beaman." So that Gulf is sitting and attempting to shift it and they don't care which way they shift it, back or forth. They might well shift it to L.P.W. They are just as happy that L.P.W. gets the responsibility.

But Gulf is taking this position, and this is why it is important, it seems to me, that L.P.W. and the Gulf are here, both in the case.

THE COURT: If it is important that Gulf is here, I forced you to trial without the man responsible here, so I will reserve decision until he gets here.

MR. FUREY: Your Honor, may I speak to that point also. I was in touch with my office at noontime and Mr. James Furey, who is familiar with the proceedings,

will be here tomorrow to try the case, and I want to get the permission of the Court to have him.

THE COURT: Certainly. You may hold your opening until he gets here, even though otherwise the openings might be concluded.

MR. FUREY: Thank you.

THE COURT: You can hold your opening until he gets here.

MR. FUREY: Thank you. I appreciate it.

THE COURT: And I will reserve decision on this motion until he has had an opportunity. I assume you are ordering the minutes, are you?

MR. FUREY: Yes.

THE COURT: It has to be transcribed.

MR. FUREY: That's correct.

THE COURT: So I will reserve decision on this motion until he has an opportunity to study it. In the meantime I have displayed my ignorance or lack of knowledge for everybody to see, and if he can show I am wrong, I will hear it.

MR. HAUT: Your Honor, if you are going to withhold his hearing, I respectfully suggest that I at least not be required to open until I hear what Gulf has to say. I would not like to be in a position to make

my statement before I hear what Gulf has to say, sir.

MR. DUBROWSKI: I join in that. I am a third-party defendant too.

MR. BRILL : I join in that too because there is a cross-claim over against Gulf.

MR. WINOKUR: That would apply to me too. There is no point in my making an opening.

THE COURT: Are you prepared with your first witness?

MR. AUSUBEL: Yes, your Honor.

THE COURT: I will tell the jury that one of the counsel isn't here, we are holding openings of defense counsel. In the meantime we'll proceed.

MR.AUSUBEL: May I urge upon your Honor perhaps to reconsider and require the openings?

THE COURT: What difference does it make on your first witness?

MR. AUSUBEL: I don't know what issues I am going to have to meet based upon openings.

THE COURT: Who is your first witness?

MR. AUSUBEL: I intended to call a police officer.

THE COURT: What issue can you be harmed by?

MR. AUSUBEL: I don't know what issues I am

going to have to contend with in terms of the manner of the occurrence of the accident.

THE COURT: It seems to me I can tell from your opening what the issues are. I don't know why you need that. Are you in doubt as to any point? I will ask you to ask defendants what their position is, and advise you.

If you in good faith don't know--

MR. AUSUBEL: I don't know if they are challengin the manner of the occurrence of the accident.

THE COURT: Are you challenging the manner of the occurrence?

MR. DUBROWSKI: The happening of the accident we don't dispute. The manner of the occurrence may be in dispute, I think.

THE COURT: In what manner do you challenge the manner?

MR. DUBROWSKI: Well, in reading the EBT's, the plaintiffs testified it happened one way and Mr. James in his examination before trial said another way.

THE COURT: I can't believe that after going through pre-trial for 30-odd months in this case you don't know what their contentions are going to be in cross-examining your witness.

MR. AUSUBEL: Your Honor, I will proceed and call my first witness if you wish to have their openings tomorrow. I don't want to quarrel with the Court.

THE COURT: I forced a client to trial in the absence of his lead counsel. He advised me he has lead counsel ready tomorrow. Unless you can show me how you are going to be hurt, I am going to advise the jury of the situation and proceed.

MR. HAUT: Your Honor, I suggest to the Court that the proper procedure would be to finish the openings. If we can't finish the openings before --

THE COURT: You said you can't finish before Gulf or else an adjournment.

We have to get rid of this case. Is anybody prejudiced by what I am suggesting?

MR. HAUT: Yes, sir.

THE COURT: How?

MR.HAUT: I think the openings should be before the testimony.

THE COURT: I know they should. Are you prejudiced by what I am suggesting and if so how? We have got to get through with this case someday or it will be 2026 before we get through with it.

MR. DUBROWSKI: Let's hope we live that long.

MR. BRILL: Your Honor, I would like to make an application to dismiss the complaint on the opening in behalf of my client, the James Corporation. If your Honor would care to hear that now or prefer to hear argument after the openings are concluded--

THE COURT: You want to make an application?

MR. BRILL: Yes, sir. An application to dismiss the complaint.

THE COURT: On the basis of what?

MR. BRILL: On the basis of the statements made in the opening.

THE COURT: Certainly. Make it now. You don't need to hear anything anybody else has to say.

MR. BRILL: I recall hearing from the opening that the plaintiff expects to prove that the James Corporation was in possession pursuant to a one-year lease; that he had no right to make any change without Gulf's consent; that Gulf was supposed to make structural repairs and pay for them, and that Mr. James made this statement in substance that Mr. James had no duty or occasion to repair the coping or the roof, as the plaintiffs contend gave way as a result of while they

were doing their work.

Aside from any other consideration, it would appear to me, your Honor, that under 200 or any other provision either of statute or the common law, we would have no obligation to the plaintiffs.

THE COURT: He was just relating what one of your witnesses was going to say. That is an entirely different proposition from his asserting that he was going to prove by contract the way he did with the others. The mere fact that he says one of your witnesses is going to say something doesn't mean the jury has to believe it.

MR. BRILL: What he says isn't part of the case. It happens that the examinations bear him out in that regard.

THE COURT: No, he says that this is what they are going to testify to. That doesn't mean the jury has to believe it. It seems to me this is a question of fact you are raising.

MR. BRILL: If he says out of his own mouth --

THE COURT: I have just finished telling you, the jury doesn't have to pay any attention to what he says out of his own mouth.

MR. BRILL: Nevertheless, we are here before

your Honor and I submit this is a matter of law, if this is what the plaintiff says the facts are.

THE COURT: No, no, he said that this is what various witnesses are going to say.

MR. BRILL: He didn't say he was going to prove anything to the contrary, and that this is the way the proof is going to finally wind up.

THE COURT: I will deny that motion, with leave to renew.

MR. BRILL: Respectfully except.

THE COURT: I know it is not the way it is ordinarily done and I know it is not the way it should be done, but unless somebody will suggest a way that anybody can be prejudiced, I am going to proceed, ask the plaintiff to proceed with the proof as far as we can go until 4:30, and I will explain the situation to the jury.

MR. HAUT: May I be heard on that?

THE COURT: Yes.

MR. HAUT: Here, when we have a trial, it seems to me the witnesses are under oath and the jury is evaluating credibility. The witnesses are now going to be testifying, the jury is going to be listening to credibility and going to be attuned to listening to people talk and evaluating credibility, and

suddenly tomorrow, sir, lawyers will again be standing before the jury, confusing them, because then they will not be listening to them for credibility but listening to them just to hear contentions. I submit, sir-

THE COURT: I have a much greater confidence in juries.

MR. HAUT: Your Honor, I submit that this comes to the point where it may be so influential to the jury that they at that point may be unable to eradicate that which they have heard.

But furthermore, and I think this is more important, in the jury's mind there will be a difference between what they have heard today before the trial and what they have heard tomorrow after the trial has started. And I suggest again that this borders to the point where they may again be unable to differentiate in their minds. I suggest this respectfully, sir, without meaning to aggravate the Court.

MR. BRILL: I think that counsel--

THE COURT: Never mind about aggravating. I get aggravated very easily. Don't pay any attention to it.

MR. BRILL: I think counsel has made an excellent point, your Honor. He points out that the jury

is going to hear the testimony of witnesses on any of the issues involved in this lawsuit, and then have to hear opening comments by counsel. It may be confusing to them, even though your Honor has confidence in their judgment, in their ability to differentiate, and it may possibly be prejudicial to the parties. That is the reason I join in the application.

THE COURT: In my judgment that doesn't raise any problem. Bring the jury back.

MR. FUREY: Your Honor, may we approach the bench and can I just address to you?

THE COURT: Yes.

THE COURT: Off the record.

(Discussion off the record, at the side bar.)

(In open court, jury present.)

THE COURT: Ladies and gentlemen, we are going to proceed in a somewhat unorthodox manner. As you have observed, there are quite a number of counsel, parties, in this case. The attorney for one of the parties, the man who is planning to try the case for Gulf, was on trial in another court, and I just ruled earlier this morning that we are going to have to get started with this case sometime, and the day that everybody would be ready would probably never come, so

we are starting without him. However, I have ruled that we may put off the defendants' openingsuntil tomorrow morning. But, however, I believe that there is certain testimony we can get that you can appreciate perfectly wel without having heard the defendants' openings, so we are going to proceed with that testimony. I have complete confidence that you will be able to sort things out. And if it should turn out that I was wrong, then we will call any witnesses that were called before, we will ask them further questions, but I don't think that will happen.

Bear in mind you are going to hear the defendants' contentions tomorrow, but in the meantime you are going to hear some testimony.

MR. AUSUBEL: Mr. Leporati.

O T T O L E P O R A T I, having first been duly sworn as a witness for the plaintiff, hereby testified as follows:

THE COURT: You are a retiredpolice inspector?

THE WITNESS: Sergeant.

THE COURT: Sergeant. Sergeant, you heard what I said. And I am calling you sort of out of order, so you won't have to come back. It may be you will have to come back anyway, but we'll do the best we can.

MR. AUSUBEL: May I?

THE COURT: Proceed.

DIRECT EXAMINATION BY

MR. AUSUBEL:

Q Mr. Leporati, there was a time when you were a member of the New York City Police Department, is that correct, sir?

A Yes, sir.

Q When did you work for the New York City Police Department?

A 1949 to 1969.

Q Would you try to keep your voice up so that we could all hear you, sir?

A From 1949 to 1969.

THE COURT: You know, if you would move the lectern back, he would automatically project his voice to where you are.

MR. AUSUBEL: Thank you, sir.

Q You were there for 20 years, is that correct?

A That's correct, sir.

Q When you went to work for the New York City Police Department, were you eventually assigned to some department or departments of the New York City Police Department?

A Emergency Service Division.

Q When did you become assigned to the Emergency Service Division, sir?

A In 1949.

Q Were you a member of that division from 1949 right up to 19--right through 1966?

A Yes, sir.

Q Were you in that division throughout your career with the New York City Police Department?

A Yes, sir.

Q What function is it of the Emergency Service Division of the New York City Police Department, what do they do?

A In what respect?

Q Did you handle certain types of investigations as a member of the Emergency Service Division?

A No, sir.

Q All kinds of accidents were investigated?

A No. We have equipment which is not normal to other parts of the Police Department.

Q I see.

A And when this equipment is needed, we would be called in them cases.

Q When you would be called out to investigate or assist in any kind of an accident or occurrence, was

it a regular practice of the New York City Police Department during your years of service with the Emergency Service Division to make out official reports?

A The Emergency Service Division made out a report whenever they answered a call.

Q Were these reports which were prepared in the regular course of the business of the members of the Emergency Service Division?

A Will you repeat that, please?

Q Were these regular reports which were made out by members of the Emergency Service Division?

A Yes.

Q In accordance with the regulations of the New York City Police Department?

A Yes, sir.

Q And were these reports prepared on or about the time of the accident or occurrence which was being investigated or partaken of by the Emergency Service Division?

MR. BRILL: If the Court please, I object to the form of the question. Counsel had previously asked the witness what the duties were, and he said that they had special equipment, and now the question relates itself to investigations that were made.

THE COURT: He makes reports. I take it you are going to try to qualify some report he made?

MR. AUSUBEL: Yes.

Q Are these reports that are prepared, are they prepared on or about the time of the event?

A Yes, sir.

Q And are they then filed in the regular course of your duties as a member of the Emergency Service Division?

A Yes, sir.

Q And become part of the official records of the New York City Police Department?

A Yes, sir.

Q Is that correct?

A Yes, sir.

Q These are public records?

A Yes, sir.

THE COURT: Do you have a particular report?

MR. AUSUBEL: Yes.

THE COURT: Why don't you ask him about that particular report rather than about his practice?

Q In 1968 what was your title with the New York City Police Department?

MR. DUBROWSKI: Objection, your Honor.

We are dealing with an accident that occurred prior to that date.

Q Excuse me. 1966.

A I was a Sergeant.

Q And when were you promoted to Sergeant?

A In 1963.

Q Did there come a time when you were called upon to investigate or assist in connection with an occurrence that took place on June 28, 1966, at 116th Street and 8th Avenue in Manhattan?

A Can I refer to notes?

THE COURT: Have you got a document that he signed? Why not show it to him?

(Plaintiff's Exhibit 1 marked for identification.)

MR.FUREY: May I look at that?

THE COURT: Show it to counsel.

MR. FUREY: I would just like to look at it.

THE COURT: You don't remember everything you did in 1966, you mean?

THE WITNESS: What's that, sir?

THE COURT: You don't remember everything you did in 1966?

THE WITNESS: I am afraid not.

MR. AUSUBEL: I have furnished my adversaries with a copy of Plaintiffs' Exhibit 1 for identification.

Your Honor, may I proceed?

THE COURT: You have examined it?

MR. FUREY: Yes.

THE COURT: You may proceed.

Q Sir, did you prepare this Plaintiffs' Exhibit 1 for identification? Is this your report in connection with your investigation of this accident?

A This is my report.

THE COURT: You say,"This is my report." You mean you didn't investigate the accident?

A No, sir, we don't investigate accidents.

THE COURT: You did not investigate the accident?

A No.

THE COURT: So it is not your report with respect to the investigation of the accident?

A No.

THE COURT: But it is a report.

Q Were you at the scene of the accident?

A Yes, I was.

Q And while you were at the scene of the accident what did you observe while you were there, sir?

MR. DUBROWSKI: Objection, your Honor. May I object at this point, because the report that counsel showed me had nothing with this witness' name on it or signature.

MR. AUSUBEL: Excuse me, sir, this report does have his name on it.

MR. DUBROWSKI: The copy shown me did not.

THE COURT: This is your name in type?

A Yes. Normally we sign that, probably at the beginning of my name. It is not a good copy.

THE COURT: Is this a xerox or is this an original?

A That's a xerox.

THE COURT: What?

A That's a xerox.

THE COURT: That is a xerox?

A Yes.

THE COURT: And that very faint line there--

A Would probably be my name.

THE COURT: Does it look like your signature?

A It looks like the starting of it here.

THE COURT: Show him the original. You heard what the witness said about it. This is a xerox and the

witness says that that appears--

MR. DUBROWSKI: All right. Then the copy I saw did not come through, sir.

Q This Plaintiffs' Exhibit 1 bears your name, title, shield number, and the squad, the emergency squad number you were then assigned to, is that correct, sir?

A That's correct.

Q When did you prepare this report, Plaintiffs' Exhibit 1 for identification?

MR. FUREY: Objection, your Honor. Did he testify that he prepared that report? I thought his name just appeared on it.

THE COURT: Did you prepare that report?

A Yes, sir.

THE COURT: Yes, he did. I thought he had.

MR. FUREY: Thank you. I apologize.

THE COURT: In all the confusion you might have missed it.

Q Sir, could you--

THE COURT: He did prepare the report. When did you prepare it?

A On the same day.

THE COURT: Same day.

Q While you were at the scene of the accident, 116th Street and 8th Avenue, on June 28, 1966, just tell us what you saw and what you did.

THE COURT: Do you have any present recollection or are you just reading that report?

A From my recollection, on the report there are things that might have been seen before I arrived on the scene. When I got to the scene there were two men injured on top of an ice machine and a telephone booth.

Q Did you get the names of these men?

A Not myself, but they were gotten.

Q Was one of them James McLean?

A Both names, both persons identified in the report were the two people that were injured.

Q Correct. What I am trying to get from you, sir--

THE COURT: Those two names on the report are the names of these plaintiffs?

Q James McLean and Joseph Linfante.

A That's correct.

Q Apart from getting the names of the injured, did you make some observations about the structure of the building?

A Only in size.

Q Sir?

THE COURT: Only in size.

A Only in size.

MR. AUSUBEL: Stand back.

MR. HAUT: Your Honor, I can't hear the witness.

A Only in the size of the building.

THE COURT: Only in the size?

A That's right.

THE COURT: Oh, I thought you said inside. Your observations only were to the size of the building.

A Size of the building.

Q Did you make any findings or observations with respect to any overhang or coping of the building?

A This is from the report or from recollection?

Q Well, by looking at the report-- I realize this occurred more than seven and a half years ago--would you look at the report and see if it doesn't refresh your recollection, sir.

THE COURT: In other words, there are two things, Sergeant. In the first place, if you look at the report, and all you could do is read what's there and it doesn't recall anything back, you are not allowed to read it unless it goes into evidence; but if you look at the

report and it brings back so you now remember something that you then knew, you are allowed to tell us that. Do you get the distinction?

A They were working on a, what we call a cornice. They were working on a cornice. And this apparently fell.

MR. FUREY: Objection to what apparently happened, your Honor.

THE COURT: It looked to you as though it had fallen?

A It looked to me as though it had fallen and in some manner the two men also fell at the same time, landing on top of the ice machine and the telephone booth.

Q Did you make an observation as to what happened to that cornice?

A No, sir.

Q Did you by looking at that report, does it refresh your recollection?

MR. DUBROWSKI: Objection to this, your Honor. We got an answer now. He said he didn't know and he previously looked at the report to refresh his recollection.

THE COURT: Look at it again. Do you remember now anything about what happened to the cornice? Not is it

written there.

A No, I don't.

THE COURT: He doesn't.

MR. AUSUBEL: I offer this report in evidence.

THE COURT: Tell me, I assume it must have been part of your duties to make this report or you wouldn't have done it, is that correct?

A That's correct, sir.

THE COURT: Within how long after you left the place of the accident did you make this report?

A We normally make them out in the same tour of duty.

THE COURT: In the same tour of duty and that is an eight-hour tour.

A Yes, sir.

THE COURT: So your normal practice is it would have been made out within eight hours of the accident?

A That's correct, sir.

THE COURT: Are there any dates on there to indicate whether the normal practice was followed in this case?

A Yes, according to the times on it, I would say that was done within the same eight hours.

THE COURT: He said according to the notations on there he would say it was done within the eight hour tour.

Any objection?

MR. HAUT: No objection, your Honor.

MR. DUBROWSKI: May I see it again, your Honor?

MR. FUREY: Yes, I would like to see it again, too.

Your Honor, I am going to object to that being offered into evidence, on the ground that there is a version of the accident, and I believe the sergeant has testified that he was not present at the accident and there is a certain version of the accident that may be prejudicial to my case.

THE COURT: I believe the law is that if the entry is made in the course of his professional duties, which apparently it is, then it is admissible and you can argue the hearsay nature to the jury. So I will overrule your objection.

MR. FUREY: Your Honor, I believe that a proper foundation has not been laid for the hearsay aspects of it, and also I believe, I submit-- I don't have any cit to put forwards at this time--but that if a document is kept in the regular course of

business and there are certain hearsay statements contained in this document, that the effect of the hearsay outweighed the probative value of that piece of paper's coming into evidence.

THE COURT: That is not my present understanding. But if you persuade me you are right, I will entertain a motion to strike. Proceed.

(Plaintiff's Exhibit 1 received in evidence.)

Q After you came to the scene of the accident--by the way, were there other police officers who were there at the scene, sir?

A Yes, there were.

Q And after you came to the scene of the accident, what if anything did you do with respect to Mr. McLean and Mr. Linfante?

A We put Mr. McLean in what we call a Stokes basket, it's a large metal stretcher, in other words to remove him from on top of the ice machine and telephone booth, and then carried--lowered that to the ground and brought him to the ambulance.

THE COURT: To the ambulance?

A Yes, sir.

Mr. Linfante got down by himself and walked to the ambulance.

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Q Insofar as this ice machine was concerned, sir, could you tell us how high above the level of the ground the ice machine was?

A On a rough estimate I would say about ten feet, the same height as the telephone booth.

Q And about how high above the level of the ground was the roof, have you any estimate of that?

A No, I couldn't say.

THE COURT: There was a telephone booth, you say?

A Yes.

THE COURT: About the same height as the ice machine?

A Yes.

Q Now, I am going to show you some photographs and I am going to ask you if these photographs fairly and accurately represent the ice machine and the two plaintiffs, Mr. McLean and Mr. Linfante, as you found them at the scene when you arrived here.

MR. AUSUBEL: Excuse me, apparently the procedure is to pre-mark the exhibits for identification.

THE COURT: May I also look at them?

Wait until the witness has looked at it.

(Plaintiffs' Exhibit 2 marked for identification.)

THE COURT: What's your answer? Does that top picture fairly show the ice machine as you remember it?

A Yes.

MR. AUSUBEL: I offer it in evidence.

THE COURT: You haven't said anything about the second picture.

Q What about the second photograph, does that fairly and accurately represent Mr. Linfante?

THE COURT: Do you remember seeing that?

A That I couldn't tell you.

Q You couldn't tell?

A No.

Q But the upper one does refresh your recollection?

A Yes.

MR. AUSUBEL: Then I will offer the upper of the two photographs in evidence.

THE COURT: The lower one isn't being offered, so it can be physically detached.

MR. FUREY: Your Honor, I would like to make certain objections to this, but I feel it should be done outside the scope of the jury.

THE COURT: All right. You want it outside

the presence of the jury.

MR. FUREY: Yes, please.

(At the side bar.)

MR. FUREY: I just object on the simple fact that it is a newspaper clipping, the original should be produced, and the fact that it is from a newspaper lends certain credence and notoriety to this accident which is prejudicial also in this case. The newspaper pictures sometimes can be retouched, or two of them put together, and they really don't let you see the whole picture.

MR. HAUT: There is no evidence of that here.

MR. AUSUBEL: The witness has identified it as a fair and accurate representation of the conditions that obtained at that time.

MR. DUBROWSKI: You didn't ask that question.

MR. AUSUBEL: I did ask him that and he did identify it and that is sufficient foundation for the admission of the picture.

THE COURT: What's this General Electric Appliance Jewelry? What has that got to do with it?

MR. DUBROWSKI: It is a building down the

block or across the street, your Honor.

THE COURT: What?

MR. DUBROWSKI: I think it is the building down the block, your Honor. It is just background.

THE COURT: I think I will sustain the objection.

(In open court.)

THE COURT: You had nothing to do with the taking of that picture?

A No, sir.

Q You were present there at that time when the photograph was taken?

A Yes, sir.

Q And that photograph is a fair representation of the conditions at that time when you were there?

A That's correct.

THE COURT: He has already said that. Objection sustained.

Q Was there an ambulance-- you have mentioned about Mr. McLean being taken down in what you called a Stokes basket, is that correct?

A That's correct.

Q And what does that mean, sir? How did you do that and what did you do with respect to Mr. McLean?

A When a person has an injury whereby just moving him might aggravate the condition, what we do is use what we call a backboard or a Stokes basket. We can place him on this rather than a stretcher and keep from moving that part of the body on which he is injured and in that way lessen any further damage to an injury.

Q And did you take him down from the top of this ice machine?

A That's correct.

Q And eventually was he put into an ambulance?

A Yes, he was.

Q Did Mr. Linfante also go into the ambulance?

A Yes, he did.

Q Was that ambulance in Harlem Hospital?

A I will have to look at the report.

THE COURT: I assume it was. No doubt about that, is there?

A Yes. It was Metropolitan Hospital ambulance that took him to Harlem Hospital.

Q Did you know any of the parties to this accident before the accident?

A No, sir.

Q Did you know Mr. Linfante or Mr. McLean or any

of the other people that were involved?

A No, sir.

Q After you filed this report, that was your last connection with the accident, is that correct?

A That's correct.

Q And the other day our office served you with a--

THE COURT: Well, --

MR. AUSUBEL: Your Honor, I think I have a right.

THE COURT: He is here under subpoena.

Q Yes. You received a subpoena from our office, is that correct?

A That's correct.

MR. AUSUBEL: I have no other questions.

THE COURT: Any questions?

CROSS EXAMINATION

BY MR. WINOKUR:

Q Do you recall the appearance of the coping which you said had been broken away and was on the floor?

MR. DUBROWSKI: Objection. That is not what the testimony was.

MR. WINOKUR: May I have the report, please?

Is this in evidence?

MR. AUSUBEL: Yes. This is my copy.

MR. WINOKUR: May I use it to question the witness?

MR. AUSUBEL: Surely.

Q Do you remember reading this report awhile ago?

A Yes.

Q That is now in evidence. There is stated here in the report, "While working on a three-foot by fifteen-foot extension of an aluminum coping, which was attached to concrete cornice, when the concrete gave way." Do you remember that being stated in that report?

A Yes.

Q Is that stated of your own--from your observations?

A No, sir.

MR. FUREY: Your Honor, note my objection to the question.

Q Where did that information come from?

A That comes from whoever was involved in the accident.

Q You weren't on the scene?

A Not when the accident occurred, no, sir.

Q No. And who gave you that information?

A I would say that information was obtained

from the injured parties.

Q Did you look at the section of aluminum coping?

A Yes.

Q It was there physically when you came?

A Yes.

Q Did you look at it?

A Yes.

Q Do you remember what it looked like?

A No, not offhand.

Q Did you see where the aluminum coping was fastened?

A No, sir.

Q It's stated here that it was attached to concrete cornice but you don't know that of your own knowledge?

A No, sir.

Q And you don't remember that from your own observations.

A No, sir.

MR. WINOKUR: All right.

CROSS EXAMINATION

BY MR. FUREY:

Q Sir, how long after the accident did you

arrive at the service station, the scene of the accident? From your recollection, sir. Do you have a recollection?

THE COURT: I assume you have no recollection.

A No.

THE COURT: Of the time.

Q All right, then refer to this report.

A I would say within five minutes of the time that the call first came in.

Q Do you know that for a fact?

A Well, that would be approximately the time it would take us to get there.

THE COURT: You have no idea of how long it took somebody to put the call in.

A Right.

MR. FUREY: I have no further questions.

CROSS EXAMINATION

BY MR. BRILL:

Q Officer, I just want to ask you a few questions. As I understand your testimony-- and if I am wrong, set me straight-- when you came to Court today you had no independent recollection of this occurrence, is that right? You made the report but you had no independent recollection of what occurred or

what happened?

A Until I looked at the report, yes.

Q Right. And you did make up a report but you couldn't tell us what the exact source of the information is, can you?

A Well, the normal procedure would be to ask the people involved and get the information from them. They would be there at the time.

Q When you refer to people as the people involved, whom are you trying to tell us you had spoken with?

A In a case like this it would be the injured parties.

Q This was a gas station,was it not?

A Yes.

Q Were there any people there other than the injured parties that could have been questioned as to what they knew about this?

A Yes. That mighthave been done.

Q It might have been done.

A That's right.

Q But your report doesn't indicate who gave you the information.

A That's correct.

Q Of your own knowledge you have no recollection

whatever of having gone up to the roof or examined the coping or having seen any signs of damage on the roof?

A That's correct.

Q And you have no independent knowledge as to how the work had been done by these two gentlemen.

A That's correct.

Q Who you assisted. You have no way of knowing at this time nor can you inform the jury and the Court as to what the cause if any was for the coping having come down.

A That's correct.

THE COURT: I take it it is highly unlikely that you would have gone to the roof to look at it.

A Only if there were a possible chance of anything else falling. The precinct involved would make the investigation.

Q Your duties were not that of an investigator, were they?

A No, sir.

Q You were there to render assistance of people in trouble.

A That's correct.

Q As a matter of fact, there is an accident investigating squad connected with the police department,

isn't that a fact?

A That is for motor vehicle accidents.

Q It has nothing to do with this type of an occurrence?

A No, sir.

Q Incidentally, this was on private property, wasn't it? I mean, this occurred on private property?

A I believe so.

Q Yes. And where this overhang, as it has been referred to, had been attached or where it was being erected, that didn't face out onto the sidewalk of the public street, did it? It faced out onto the gas station, isn't that a fact?

THE COURT: The question is did this hang over the public street in any way, shape or form?

A No.

MR. BRILL: I don't think I have any further questions.

THE COURT: Let me get it straight. Your special equipment that you talked about had to do with injured people, not for structures, is that right?

A That is--well, we have things where we tie cornices back and anything at all, cut them, bring them down, lower them. It doesn't necessarily mean for

people that are injured. It may just be a dangerous condition where we tie up the sign or lower it.

MR. AUSUBEL: Your Honor, may we have that answer read to the jury, I didn't hear it at all.

May we have it?

(Answer read.)

THE COURT: On this occasion, as I gather, your concern was for the injured person.

A That's correct.

CROSS EXAMINATION

BY MR. DUBROWSKI:

Q In this report, there is nothing in your report about doing anything to the cornice at all, is there?

A That's correct.

Q Sir, I notice the report is typed, right, sir? The report that you have is typewritten, right, sir?

A Yes, sir.

Q And I gather the police department doesn't furnish you a typewriter to carry around with you in making your rounds, does it?

A No, sir.

Q The fact of the matter is that they give you what's known as a memo book, don't they, sir, a blank

memo book?

A You mean a patrolman on the street?

Q Anything you go out on, for your whole tour, you have what's known as a memo book, don't you, sir?

A Yes.

THE COURT: What he wants to know is, what did you take original notes on in this case?

Q That's right, that is what we are working on.

A On a piece of paper.

Q You had a blank memo book, right, sir?

A Yes.

Q In the course of the tour during the day you would make numerous calls, right?

A That's correct.

Q And each call you would make you would put down the time and what went on on the call, right, sir?

A Yes, sir.

Q And when you get back at the end of the day, these reports would be typed, right?

A No, sir.

Q No? Well, when would they be typed?

A In the Emergency Squad, in my function in this case, we would be called out only when we were required. I worked on the emergency truck, not on the cars

that are patrolling the streets. When we get out there, we would do the job, return to our quarters, and that is when the report is typed up or prepared.

Q Then you typed this up from memory or from the memo book, sir?

A From the information that has been gathered by the various patrolmen of the squad.

Q The information that is gathered by various members of the squad include you and other members of the squad, right, sir?

A That's correct.

Q So some of this information may have been obtained by other people rather than by you alone, right, sir?

A That's correct.

Q And when it is gathered is it gathered all in the head or is it written down on pieces of paper?

A Written down.

Q And is that in the memo book, sir?

A It may be.

Q Do you have your memo book for June 28,1966, sir?

A No, I do not.

Q You don't. Sir, this man you said was on top of the ice box or whatever you want to call it,we'll call

it ice box, all right?

A All right.

Q You didn't just jump up there. How did you get up there?

A We have ladders.

Q And what kind of ladder did you have?

A We have wooden ladders.

Q Are they "A" frame ladders?

A No.

Q What kind of ladders are they?

THE COURT: Stand back so other people can hear you.

MR. DUBROWSKI: I am sorry, your Honor, I have trouble hearing him.

THE COURT: I know, and that is why I want you to stand back.

A Extension ladders.

Q Extension ladders. And when you were at the scene were there any ladders there, do you recall?

A I don't remember.

Q Do you remember if you used any ladders that were there?

A Yes, we did.

Q Which one, your ladder or their ladder?

A That I couldn't say offhand.

Q In any event, Mr.McLean was taken down by this basket-type stretcher thing where he tied into the stretcher, right, sir?

A That's correct.

Q And he is lowered down by the members of your team, right?

A That's right.

Q Would you say that is about ten feet from there to the ground, right, sir?

A Approximately.

Q That is your best recollection?

A Yes, sir.

Q And the telephone booth was about ten feet from there to the ground?

A I would say so.

Q And Mr. Linfante got down by himself, did he?

A That's correct.

Q Did he use a ladder or did he jump or do you know?

A He would use a ladder.

Q Did you see him use a ladder?

A Well, we wouldn't let him jump.

Q Could he have jumped?

A Could he have?

Q It's a possibility?

A I don't know it's a possibility.

Q You don't have any independent recollection of how he got down, do you?

A Well, I would say that we wouldn't allow him to jump.

THE COURT: You are just speculating on the basis of practice.

Q You are just speculating?

A Right.

THE COURT: You don't have a present recollection of seeing him go down the ladder.

A No, sir.

MR. DUBROWSKI: Thank you, sir.

MR. HAUT: I have no questions, your Honor.

MR. AUSUBEL: I have a few questions, if I may, on redirect, your Honor.

REDIRECT EXAMINATION

BY MR. AUSUBEL:

Q Mr. Leporati, I understand your procedure is that this report which is Plaintiff's Exhibit 1 in evidence is prepared based either upon written notice that you had taken at the scene or had put into a memorandum

book and eventually had dictated or transcribed within the same tour of duty that you were on in connection with your investigation of this occurrence, is that correct, sir?

A That's correct.

THE COURT: You and other people, as I understand your testimony. These weren't only your recollections but the recollections of the patrolmen under your command.

A This would be written notes more than recollection.

THE COURT: Well, written notes.

A Right, that we would go by.

THE COURT : In other words, when you got back to the station house, everybody that was under your command told you what they had observed or what they had on their notes and you--

A Put it together.

THE COURT: --and you put it together.

A Right.

Q Officer, in addition to your concern for the injured people, you were also concerned about any potential unsafe conditions relative to the building, weren't you?

A That's correct.

Q That was one of your functions as a member of the emergency service report, is that correct?

A That's correct.

Q And in this particular case, after you got there, didn't you arrange to tie the aluminum coping back with a half-inch line?

MR. FUREY: Objection, your Honor.

MR. BRILL: Objection.

MR. DUBROWSKI: Objection.

THE COURT: On what ground?

MR. DUBROWSKI: Your Honor, there is nothing in that report that says anything about that. Previously on somebody else's cross examination and mine he didn't testify about that. And he didn't know anything about that cornice, he has no recollection of that cornice.

THE COURT: Is that right, you have no recollection of the cornice?

A That's correct.

Q Let me direct your attention to Plaintiff's Exhibit 1 in evidence, sir. Wasn't it reported on this report--may I approach the witness and direct his attention to the specific sentence--"That aluminum coping was tied back with a half-inch line."

A That's right.

Q Is that correct, sir?

A That's correct.

Q And in fact after looking at Plaintiff's Exhibit 1 in evidence, wasn't that the fact, that you did indeed arrange to tie back this condition, is that correct?

A That's correct, according to this report.

MR. AUSUBEL: That is all.

THE COURT: Anything further now?

As you heard me explain to the jury, one lawyer who should be here was for reasons beyond his control not able to be here.

A Yes, your Honor.

THE COURT: If he should find something that he wants to ask you, I will have to ask you to come back. Otherwise you are through.

A Right.

(Witness excused.)

MR. AUSUBEL: Your Honor, just a moment, may we approach the bench before the witness leaves?

THE COURT: Yes.

MR. AUSUBEL: With respect to that perhaps he doesn't have to come back.

(At the side bar.)

MR. AUSUBEL: Mr. James Furey is here.

THE COURT: Do you think I didn't see him? I know him.

(In open court.)

THE COURT: All right, Sergeant, you probably won't hear from us, but if you do I will see you again.

Are you ready to proceed with another witness?

MR. AUSUBEL: If you wish me to, yes, I can, your Honor.

THE COURT: Why don't we approach the side bar.

(At the side bar.)

THE COURT: Who is the next witness?

MR. AUSUBEL: I can call the plaintiff. That is no problem. I don't want you to think that I am trying to hold up the trial.

THE COURT: I understand. But as a practical matter, we have 40 minutes of direct of the plaintiff. Is there any harm in that?

MR. FUREY: Yes, your Honor. At this time I would like to ask to be put over until tomorrow, on the basis that 40 minutes of direct is going to go in, I am going to have the transcript ordered and so forth,

and it will be just as simple to have the direct beginning testimony with Mr. Furey here.

THE COURT: All right.

MR.AUSUBEL: Judge, he has to.

(In open court.)

THE COURT: Ladies and gentlemen, for the amount of time left, amount of time we would save by proceeding in this unorthodox fashion, I don't think it is worthwhile. So I will let you go until tomorrow morning at 9:30.

Is 9:30 agreeable to everybody?

MR. ADELMAN: Your Honor, I am a commuter, and with the trains today, it is hard to say.

I would appreciate it if you would leave it at 10:00. I will try and be here as early as possible.

MR. DUBROWSKI: I live in the boondocks of Staten Island, your Honor.

THE COURT: We have commuting problems, so we'll make it 10:00. We have a tradition in this Court, ladies and gentlemen, to try to be on time. Of course, if something happens, you can't avoid it. But try to get here five minutes early so you will be here on time. And have a good evening. There is no danger of their seeing the scene?

MR. DUBROWSKY: It is all changed.

THE COURT: Don't talk about the case with anybody and don't talk to anybody about the case.

(The jury leaves the courtroom.)

THE COURT: Does somebody want a conference?

(Discussion off the record.)

(Adjourned to February 8, 1974, at 10 a.m.)

JAMES V. McLEAN, ETHEL McLEAN, JOSEPH LINFANTE and SUSAN LINFANTE,

vs. 67 Civ. 4959

L.P.W. REALTY COMPANY, LAWRENCE PAUL WOLF, GULF OIL CORPORATION, JOSEPH JAMES, INC., and JOSEPH JAMES.

February 8, 1974.
10:00 a.m.

(Trial resumes.)

(In open court, jury not present.)

MR. FUREY: I am James Furey and I want to apologize for any inconvenience I may have caused the Court.

THE COURT: You didn't cause any inconvenience and you were well represented.

MR. FUREY: Thank you, your Honor. And I appreciate your patience.

MR. BRILL: Your Honor, I would like this opportunity to make an inquiry. I wasn't present at any of the pre-trial conferences. Before the counsel make their opening statements, I would like to ask what the Court's attitude will be with regard to remarks with respect to the cross-claims. I believe it is common in a situation where there are several defendants, and a claim by Gulf that they have an indemnification agreement in their arrangements which would entitle them to claim over

against the other defendants.

MR. ADELMAN: Not against L.P.W. Realty.

MR. BRILL: No. I realize that. If we are going to litigate that before this jury we ought to be able to talk about it.

THE COURT: Is that a jury question or is that for the Court?

MR. BRILL: It is for your Honor to decide. I think it is a law question. That is my view.

MR. DUBROWSKI: I think part of it is a jury question, your Honor, as it applies to me.

THE COURT: What?

MR. DUBROWSKI: As it applies to me.

THE COURT: You made appropriate demands for jury trial on the issue.

MR. BRILL: Yes, I believe there are, Judge.

THE COURT: Everybody has demanded a jury. So the only doubt as to whether it is a jury question is whether as a matter of law I direct a verdict.

MR. BRILL: Right. Or whether we should be permitted to comment on it or stay away from the subject on the openings.

THE COURT: I suppose it is like any trial, where you hope to win a motion for a directed verdict at

the end of the case, you would act as though it were before the jury until that happens.

MR. BRILL: All right. I will proceed accordingly.

THE COURT: Does anybody have any different views? I hadn't really given it much thought. This is my first reaction. I don't think it was discussed at pre-trial conferences.

There is a pending motion by L.P.W.

MR. ADELMAN: That's correct, your Honor.

THE COURT: To dismiss on the opening. I held it in abeyance because Gulf took the position it was interested in the motion.

In brief, the plaintiffs' counsel on opening stated that he would prove by documentary evidence that the lease between L.P.W. and Gulf was a net-net lease, reserving no rights of any supervision on L.P.W. but, on the contrary, prohibiting Gulf from doing any construction work of this nature-- I don't know the exact language of the lease-- but as far as this case is concerned, prohibiting Gulf from doing any construction work of this nature without L.P.W.'s consent, the purpose of that requirement of consent to be to enable L.P.W. to make an appropriate inspection and determine whether it is

safe. No such consent or notice was given, and on that state of facts as stated I expressed the view that I could see no reason why the plaintiffs stated any cause of action against L.P.W. The plaintiff on the one hand indicated he wanted time to look over the authorities, and counsel for Gulf indicated they thought that they had an interest in the motion.

I first pose the question: Does counsel for Gulf have a legal interest? They may have an emotional interest. In other words it seems to me to pose the question in this way: If plaintiff had decided voluntarily to discontinue against L.P.W., would counsel for Gulf have any standing to oppose that discontinuance?

MR. FUREY: I would say, sir, that perhaps a year ago the answer to that question would be no, that Gulf would not have any right to object to such a discontinuance.

THE COURT: Well, we are here now.

MR. FUREY: We are here now, your Honor, and what I am referring to is the new doctrine in the New York law of Dole against Dow, the new doctrine, which I think is still in a state of flux.

THE COURT: I am glad to hear you say that. That is what I thought.

MR. FUREY: I think under the circumstances, your Honor, that under the law as it stands now every defendant has a possible interest in partial indemnity from every other defendant. So I think under the circumstances that if the discontinuance had been done prior to trial, then there might have been consideration given to bringing this other party back into the action as a defendant for partial indemnity as an action for indemnity.

As I understand the doctrine of Dole against Dow, this is invoked automatically by the Courts for the apportionment by the jury.

THE COURT: I think you have answered my first question. You have an interest.

MR. FUREY: Yes, sir.

THE COURT: You can then address yourself to the merits of the motion.

MR. FUREY: Yes. On the merits, your Honor, aside from what was done here by the plaintiffs themselves, the theory of liability is still somewhat nebulous to me. If there is going to be a claim that this was a latent defect in the building, well, the building was constructed by the landlord, who then leased it to Gulf, and it may well be-- I am not trying to prejudge the case at this

point-- but it may well be after hearing all the evidence that there may be an issue for the jury. If there is going to be an issue for the jury of anybody in this case, there may be an issue for the landlord on that basis as to whether or not they constructed a building with a latent defect. Beyond that, I think there may well be a question whether or not what Gulf did under these circumstances was an act which violated the terms of the lease. There may be another question whether such repair violated those terms under the contract.

THE COURT: If there were a latent defect as between Gulf and L.P.W., this did not violate the lease, I suppose, then, Gulf would be required under this nebulous doctrine-- on which I am completely unashamed, or maybe I should be ashamed, at least unafraid, to confess ignorance, so I will take any instruction you gentlemen give me on the parameters of this doctrine-- if plaintiff had a claim against Gulf, Gulf might have a claim over against L.P.W. even though plaintiff had no claim against L.P.W. itself, and that claim over could be asserted in this action even though there was no formal pleadings to that effect.

MR. FUREY: I believe that's correct, your Honor.

THE COURT: I guess on that theory I can't dismiss the complaint.

MR. WINOKUR: May I be heard?

THE COURT: Yes.

MR. WINOKUR: The Dole doctrine applies only after the jury has rendered a verdict in favor of the plaintiff against all defendants. Then as between the defendants, against whom liability has been established to the plaintiff, the Court will then apportion the damage. That is completely different from saying that if the jury finds in favor only of one defendant, and against only one defendant, then that one defendant can obtain redress against the others where no claims have been asserted.

THE COURT: I am going to have to reserve decision on this motion, and I will take briefs as between you and Gulf on that issue. My present view of the law is that the plaintiff, on the basis of its opening, has asserted no cause of action against L.P.W., because in the view of the plaintiff in opening, L.P.W. had no control over the premises; and, as I read the cases, unless the plaintiff's counsel has found different cases overnight, as I read the cases control is necessary.

So, according to my present view, at the close of the case if the situation hasn't been changed I will dismiss plaintiff's case against L.P.W. unless in the meantime-- I won't say you will convince me-- but I will be convinced one way or the other, depending on how I determine the question which you gentlemen will brief to me, as to whether I am entitled under this new doctrine to let it go to the jury against L.P.W. on the theory of claim over, even though the claim over hasn't been asserted, formally asserted.

MR. WINOKUR: I would like to also add this: In my pre-trial memorandum I also pointed out that even if the defendant, Gulf, had asserted a claim of so-called defective construction of the parapet so that it wasn't sufficient, at least strong enough, to bear a weight of an additional structure, on which this additional structure would be placed, there still would not be any liability. I cited a very recent case which said that the lessor of the premises is not liable for injuries to the lessee or others, where the injuries to the lessee resulted from a structural defect existing when the lessee took possession.

The only exception is where the lessor retained control of a part of the premises and which part

had something to do with this occurrence. But in this case where there is no control whatever, even if there was this nebulous structural defect, which no one has really asserted exists, there would be no liability on the part of this defendant and therefore how could there be any liability under Dole?

THE COURT: I am inclined to agree with you. However, as counsel for the plaintiff pointed out, it is an unusual action to dismiss on the opening, and it seemed to me clear enough as between plaintiff and L.P.W. to take that unusual action, but it doesn't seem to be clear enough in light of these amorphous contentions that have been raised.

So I will reserve that until the close of the plaintiff's case.

MR. WINOKUR: The trouble with that is, of course, it means that I have to stay here for probably two weeks. That is what I was trying to avoid. If there was any real, genuine possibility of any liability on any theory, I would say there is the slightest doubt, I must stay.

THE COURT: I am probably influenced by the pleasure I have in having you here.

MR. WINOKUR: That is a consolation. Thank you.

MR. DUBROWSKI: Your Honor, may I join with Gulf, because they have a cross-claim against me--that is the only reason I am in this lawsuit-- may I join with them in briefing this question?

THE COURT: Oh, yes. Anyone who can educate me will be welcome.

MR. DUBROWSKI: Dole-Dow will take a lot of education for anybody, including me.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Bring the jury in.

As you know,Mr. Furey, there has been one witness who has testified.

MR. FUREY: Yes, your Honor.

THE COURT: Inconsequential testimony as far as the liability is concerned.

MR. FUREY: I appreciate your forbearance, your Honor.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen. I want to assure you that the delay hasn't been by anyone being late, except the Judge who was one minute late. We were discussing legal matters, which weren't of your concern, which is why we hadn't sent for you.

As you remember, yesterday I advised you that, because one of the counsel was not available, we postponed openings by the defendant. And you heard one witness, his testimony was perfectly clear, its significance was perfectly clear in the absence of the openings, and now we will hear the openings.

You may proceed, gentlemen. I assume you have made up your mind what order you want to proceed in?

MR. WINOKUR: I think possibly, since I am the first named defendant.

I represent the defendant, L.P.W. Realty Corporation, together with Mr. Adelman, and we'll handle this case. I may leave from time to time and he will take over if I am not here.

L.P.W. Realty is in for only one reason: That it is the owner of the real estate. It constructed and turned the building over to Gulf Oil Corporation about eight or nine years before the occurrence of this accident and since that time had nothing whatever to do with the building. It did not participate in any way in the making of these alterations, which apparently collapsed and resulted in an accident. It was not advised at any time that any alterations were to be made. It was not consulted, did not know that any

alterations were even to be made to its building. In fact, the lease provided that any alterations, structural changes of any kind, could not be made without first obtaining the landlord's permission in writing.

Nevertheless the landlord is sued, which is common practice. Where somebody is hurt he sues everybody in sight.

MR. AUSUBEL: Your Honor--

MR. WINOKUR: For a good reason. It is for a very good reason. I would do the same. I am not at all saying it is an improper practice, because when the plaintiff sues, the plaintiff does not really have all the facts and they can only be developed in the pre-trial proceedings. So he is right in suing. But we now know what the facts are.

We contend that under the law we are not liable for an act on the part of the tenant or of anyone whom the tenant employs, and therefore there is no reason why any recovery should be had against the landlord. Thank you.

THE COURT: Mr. Furey.

MR. FUREY: Your Honor, fellow counsel, ladies and gentlemen:

My name is James Furey, and in view of the situation today, it is with some trepidation that I tell

you I represent Gulf Oil Company. I am sure however that the fact that my client is an oil company will make no difference in your determination. It will be based on the evidence and the proof as it will be presented here.

THE COURT: On the voir dire, when you weren't here, we made clear that this isn't a case involving gasoline.

MR. FUREY: We do know to a great extent what the evidence will be here, because in this Court we have procedures whereby the various parties to a lawsuit can testify under oath and they tell what they know about the particular happenings, the same oath which they take if they take the witness stand. And the testimony of the two gentlemen who are suing these various defendants has been taken and recorded. So although my clients, Gulf, had no one there that day and had no connection with the work itself other than the fact that they gave the contract to one of these other defendants, we know what happened.

What will the evidence show? The evidence will show that these two gentlemen, Mr. Mc Lean and Mr. Linfante,were skilled in this work, and indeed Gulf, like any prudent corporation or home owner, let this contract to people they knew to be skilled. They let it

to Beaman, who they knew was skilled in manufacturing the components of this material, and they left it up to Beaman about getting someone skilled to install it.

These two gentlemen were skilled craftsmen who had done this job or similar jobs many times before.

What did they do? Well, they took these brackets which had been supplied by Beaman and these brackets were to be affixed to a brick wall for the purpose of providing this decorative canopy or overhang to which lights would be attached. They make the gas station look more inviting, more modern. They took these brackets, and these two gentlemen-- and nobody else was involved, just the two gentlemen who are suing, who are claiming that they were free of any contributory negligence and that one or more of these defendants were negligent. These were the two gentlemen on the job.

They took drill bits and they drilled into the brick wall. Then in those holes which they had themselves drilled into the masonry they placed anchors, and then they affixed the brackets through holes which were already in the brackets, they affixed it by hammering in rivets into the holes to affix this bracket to the wall.

We'll show, through their own admissions, they had

ladders on the job, they had two A-frame ladders. They apparently didn't have any of these portable scaffolds, but that is up to them and their employer, it is not up to us.

When they came to the point where this bracket was affixed and hanging on the wall, instead of using a ladder or a scaffold or some other means, the two of them, both, went out on this canopy, this overhang, they put a piece of wood on it to kneel on, which they described as a piece of furring strip two inches or three inches wide, and then when they were in the process of attempting to affix the lights, the overhang, the canopy, pulled away from the wall, and these gentlemen went down and were injured.

They were in the course of their employment at the time, so their employer, United Porcelain, is not a direct defendant but we have brought them in.

MR. AUSUBEL: Your Honor, I think we ought to have the jury recess for a moment. There is a matter of law which has to be handled in the light of some comments which were just made. I would please urge your Honor to do that.

THE COURT: Let's have a side bar.

MR. HAUT: Your Honor, may we have the last

read back?

Can we do it in the robing room?

THE COURT: Yes. You gentlemen don't hear what goes on over here.

(At the side bar.)

(Record read.)

MR. AUSUBEL: Your Honor, the clear purport of that remark to the jury is to indicate to the jury that these plaintiffs were covered by and received workmen's compensation benefits and that their exclusive remedy against their employer, United Porcelain, was under the Workmen's Compensation of the State of New York. That comment and the clear inference from it is highly prejudicial to the plaintiffs and has been so described in any number of cases.

THE COURT: I don't see how you can deduce that from the remark.

MR. AUSUBEL: Then I move for a mistrial in the light of it. I believe that it is an improper comment, because it permits the jury to infer--

THE COURT: I don't see that workmen's compensation has been mentioned.

MR. AUSUBEL: But the inference is that we did not sue the employer because--

THE COURT: Well, it is a fact. There is no such inference.

MR. AUSUBEL: I want to make my motion for a mistrial in the light of that comment. I believe it is reasonably inferable from that, that we did not sue the employer because our exclusive remedy against the employer is under Workmen's Compensation Law and that the plaintiffs have an alternative remedy under that statute.

THE COURT: Let's hear it again.

(Record read.)

THE COURT: I don't see that. He has to explain their position as cross-defendant. I don't see how he can do it without saying something of that nature.

MR. AUSUBEL: He could have said that they were brought in as a third-party defendant without indicating that we were in the course of our employment and therefore we didn't bring them in. I think the inference is clear. I believe it is prejudicial, highly prejudicial to the plaintiffs.

THE COURT: I don't think the inference is that clear. I will submit whatever charge on that question you want to submit, but the fact that these people are employed, or had an employer, has got to come out in the course of the trial. If the jury is going to

draw the inference you suggest, they are going to draw it from that fact. I don't see that that sentence that he just made is going to trigger that inference any more than facts which are going to come out. So the best course of action now is to ignore it. But you have your exception.

(In open court.)

MR. FUREY: And the evidence will show that Gulf did not have any foreman or any supervisor involved in this work, and indeed the very reason that they gave out the contract was to avoid that necessity, to acquire the skills of these people.

Gulf was not there to select the size of the drill but to determine whether or not it was the proper size for the anchor that went in. Gulf was not there to determine whether or not the employer had provided these men with the proper size anchors. Gulf was not there to determine whether or not the final blow which finally spread that rivet to hold it secure was actually done by either of these plaintiffs.

This accident, gentlemen, if it was caused by any negligence, was caused by the very negligence of the two people who are bringing this lawsuit.

There was some further evidence in the

depositions which stated that after the accident a piece of the coping was seen to be gone. The coping is the cap, concrete cap, that they place on top of the brick wall, a decorative effect after the bricklayers have finished building the wall, they put this on top to make it look better. The evidence is that the bracket was in no way attached to the coping; that the holes were drilled into the wall itself, and that if in fact the coping was disturbed by the fall it was by some collateral matter, either the falling material or perhaps even the attempts of the plaintiffs to get back over the top. But in any event the evidence will be clear that this business about the coping had absolutely nothing to do with the accident.

I want to thank you for your attention thus far, and at the end of this case I am going to stand up here again, I am going to ask you for a verdict in favor of my client, the Gulf Oil Company. Thank you.

MR. DUBROWSKI: Your Honor, I would like to make a motion at this time.

THE COURT: You want to make a motion?

MR. DUBROWSKI: Yes. May I approach the bench and I will tell you what it is about?

THE COURT: Yes. I will tell you why we do

these things at the side bar. Because there is a constitutional provision, which you may have heard of, cruel and unusual punishment, and it is deemed cruel and unusual to make you listen to these arguments. So we have them at the side bar.

(At the side bar.)

MR. DUBROWSKI: Your Honor, Gulf has got a third-party complaint against me.

THE COURT: And you are?

MR. DUBROWSKI: Beaman Corporation.

THE COURT: The employer.

MR. DUBROWSKI: No, I am not the employer; I am the one who supplied the materials. That is all I did. In plaintiff's opening it was brought out that the materials were furnished there several days before the plaintiffs even got there.

In this thing, in this third-party complaint, they made many allegations. The work was done wrong. He said nothing about the materials in his third-party complaint. In his opening the only thing he said about Beaman Corporation is that Gulf let the contract to Beaman Corporation, a materials corporation, period. There is no comment in that opening about the cross-complaint, about anything I do wrong. I make a motion to

dismiss.

MR. HAUT: May I make the same motion on behalf of the third-party defendant, United Porcelain. We are the employer, sir, and in the opening statement counsel for Gulf has said that these were skilled workmen. He pinpointed either there was negligence on the part of the plaintiffs or there was no negligence. That is the sole issue insofar as Gulf is concerned. So I would submit the following, sir: That if the plaintiffs were negligent, then there may be no recovery against Gulf. And if the plaintiffs were free from negligence there will be a recovery against Gulf. By that same token, if the plaintiffs were free from negligence, their employer, United Porcelain, who was only there through their employees--to wit, these two men, nobody else on the job, who were skilled workmen--the third-party defendant must be relieved from liability here.

THE COURT: What's the answer to that?

MR. HAUT: He is not the one who is answering.

THE COURT: Oh, you.

MR. FUREY: Your Honor, I have--

MR. DUBROWSKI: Can we do this outside the presence of the jury, sir? It will be easier to talk.

(In open court.)

WCpa 11

THE COURT: I think it is also cruel and unusual to keep you sitting there, so I will let you go back to the jury room.

(The jury left the courtroom.)

THE COURT: With respect to the motion that was made by Beaman--

MR. DUBROWSKI: That is me, your Honor, the materials supplier.

THE COURT: The materials supplier. It seems to me that is a motion based on the pleadings, not on the opening.

MR. DUBROWSKI: On both. On the opening no comment was made about any negligence by the third-party plaintiff against the third-party defendant.

THE COURT: I certainly don't want to make a rule of law that makes openings longer than I have to.

MR. DUBROWSKI: No, your Honor, I don't.

THE COURT: Good.

MR. DUBROWSKI: But the only thing Mr. Furey said concerning my client--

THE COURT: Assuming he didn't think it was necessary to say it in the opening, I don't think that is germane. If you say there is no allegation on pleadings, why haven't you made the motion previously?

MR. DUBROWSKI: The only thing made mention in the pleadings was: There are two things. There is one possibility of a question of law, which I don't think applies here, and the other one is that Beaman failed to perform the work, labor and services properly. We did not perform any work, labor or services. There is an indemnification clause here, but the indemnification only applies to the work done on the premises and not a completely hold harmless, in my opinion, your Honor.

THE COURT: Work that--

MR. DUBROWSKI: And I have the indemnification here, which is paragraph eighth of the third-party complaint, if you care to look at it, your Honor.

THE COURT: Why didn't you make this motion earlier? What's your position on that, Mr. Furey?

MR. FUREY: I will try to handle these in order, your Honor. There seem to be several motions pending at this point.

THE COURT: Yes, just address yourself to Beaman.

MR. FUREY: Yes, to Beaman.

First of all, your Honor, with regard to the motion addressed to my opening--

THE COURT: I don't care about the opening.

To the pleadings.

MR. FUREY: Your Honor, with regard to the motion addressed to the pleadings-- and I don't have the pleadings in front of me, I haven't looked at them-- but in any event--

MR. DUBROWSKI: Here it is. (Handing to Mr. Furey.)

MR. FUREY: Your Honor, the purpose of the pleadings, generally speaking, is so that the evidence will only go in once, and I don't know precisely what the evidence is the plaintiff is going to offer here. I don't know whether he is going to claim that we were responsible in some fashion for some of the material that was on the job that was being supplied. This is unknown to me at this time. I think that under the circumstances I have a right to bring Beaman into the action and we have a right to wait until all the evidence is in. Then after the plaintiffs' evidence is in, and I have had an opportunity perhaps to show that the responsibility lies elsewhere, that will be an appropriate time for a motion to dismiss the third-party complaint. But not at this point, when the plaintiff is keeping his own counsel as to what his case will show and I don't know it.

And of course with the question of the indemnification agreement, that may well be a question of law, your Honor, but it is going to be a question of law after the evidence is before the Court as to what was done here.

THE COURT: I am inclined to agree. If this were a question of law it should have been brought earlier and I would have had time to consider it.

MR. DUBROWSKI: Your Honor, in the one cause of action there appear to be two basic theories by the third-party plaintiff against Beaman, the third-party defendant, one of which is failure to properly provide work, labor and services, of which I did none; the other one apparently is a contractual indemnification concerning work, not completely hold harmless; it just concerns the work done on the premises.

The plaintiff in his opening did not mention anything about the material furnished by Beaman. He just said it was supplied.

THE COURT: I am not going to read the openings.

MR. DUBROWSKI: I have copious notes, your Honor. I can tell you what it was.

THE COURT: I understand, but openings are to

acquaint the jury with what's going to happen, not to lay the groundwork for motions. I thought it was different in the question of L.P.W. where in fact he affirmatively asserted matter which seemed to me to exclude liability. But I am not going to examine the opening for the purpose of seeing whether it supports a case, because that is not the function of an opening.

MR. DUBROWSKI: If I may push it a little further, your Honor, the plaintiff is not suing me. The only party that is suing me is Gulf Oil, which is the third-party plaintiff.

THE COURT: I understand. I am going to deny the motion at this time, on the basis that either you haven't got a motion or you should have made it sooner. What you are saying would preclude any proof under these pleadings. I am going to wait and see what develops.

MR. DUBROWSKI: How about the proof on the opening, your Honor?

THE COURT: That is neither here nor there. The function of the opening is to advise the jury what to expect, and if he doesn't think it necessary to say what some evidence he expects to bring--

MR. DUBROWSKI: Then I should expect no proof by Gulf against Beaman Corporation, right, sir.

THE COURT: The opening doesn't preclude him. The opening is merely his idea of what he wants the jury to know at this time. It doesn't preclude him from putting in evidence.

On the other point, what about Mr. Haut's point that there is no hypothesis on which his client could be held in, because either there is contributory negligence in which case plaintiff has no case against you, or there isn't contributory negligence in which case you have no case against United.

MR. FUREY: I think that the argument is an excellent lawyer-like approach, your Honor; however we don't know what the evidence is going to be. There were certain materials used in hanging this bracket. There may beproof, for instance, that there were defective tools involved. There may be proof that the anchoring was improper. There may be proof that some instructions were given improperly by one of these gentlemen's suppliers. I am only speculating, I don't know. Under the circumstances I think that Mr. Haut should wait around until the end of the case and see where he stands.

THE COURT: It may be proof of negligence by somebody else other than these two men who are within the employment.

I guess I will have the pleausre of Mr. Haut's company too.

MR. HAUT: Your Honor, there was no one else on the job-- of course this will have to be shown-- there was nobody else on the job and there was nobody giving them any instructions.

THE COURT: They may have sent them off to the job with improper instructions. I assume that is not going to be there but--

MR. HAUT: All right, sir, I will wait until the end of the plaintiffs' case.

THE COURT: Yes.

(Jury present.)

THE COURT: Proceed, gentlemen.

MR. BRILL: May it please the Court, my colleagues of the bar, madam and gentlemen-- ladies and gentlemen, I should say:

Itis now my turn. Those of you who have had occasion to serve as jurors before this probably appreciate the nature of the proceedings. For the benefit of those who haven't had the opportunity to serve previously, maybe a word or two of clarification by myself will be helpful to you.

As has been told to you, this is the opportunity

given to lawyers who represent the different litigants to tell you something about their case, what their contentions are, and what they understand as to the proof that is to be submitted that will substantiate their positions. Of course, we are all advocates for our clients' positions. None of us were there when these things happened. Sothat what we say, while we ask you to listen to it with respect, is not a substitute for the proof.

In addition-- and this is particularly true; I am sure it will strike home for those who have served as jurors before this--these cases are tried according to rules, and his Honor tells us what the rules are. Whether we agree with him at times or not as to doing our job, it is still his function to tell us what the rules are and we follow those rules and you will be bound by them as well.

Without further ado, I would like to point out that I represent Joseph James, Incorporated, named here as a defendant by the plaintiff, also named here as a third-party defendant, if I may use that term, by Gulf Oil, who claims that if they are eventually found responsible to these plaintiffs, they in turn are entitled to get indemnification from myclient.

I won't burden you with the details, because in my humble judgment this represents a consideration of principles of law which, depending on how his Honor will tell us those rules apply, will have a decided bearing on what your determination as between the parties should be.

Obviously, as between James and the plaintiffs, from what you have heard from the plaintiffs' own lawyer and from what I am prepared to add to, it should be quite clear-- I will refer to him as James; actually it's a one-man small operation-- James had a one-year arrangement with Gulf to run this gas station. But Gulf was and for all practical purposes is landlord, had whatever arrangement they had with the building owner, which we were not a party to. We had absolutely nothing whatever to do with the maintenance of this gas station, we had nothing whatever to do with the work that was in progress, we weren't consulted.

This obviously is a type of work which was done on many of the Gulf stations and is done by people who had been regularly hired by Gulf to do this kind of work. They wanted to refurbish the place, they wanted to redecorate. They didn't ask us how to do the work. And we had no say whatever as to how the work was to be done.

Whatever repairs, assuming some are required, whatever repairs, whether they have been of a structural nature, which of course means the repairs which affect the very manner in which the building is constructed, were out of our control. I think the plaintiffs' lawyer himself has agreed that we had nothing whatever to do with these things.

I would just like to make this further point. There are various problems, as I see it, that will eventually be presented to you.

Question number one will be: Who if anybody among the defendants caused this accident? I say we didn't, we couldn't, we were not in a position to do anything which would have a bearing on that.

The second question that you are going to be asked to consider is: How did these men, presumably experienced, how did these men conduct, do their job? How did their employer, if anyone, do what he may have done? I don't know. What did the employer have to do with how this accident occurred? If they didn't act like reasonably prudent people, which is the test, if they didn't act like reasonably prudent people for their own safety, then their own lack of proper care precludes them

from recovering from anybody, and that would be the end of the case. Of course, if in the final determination you should find that they are justified in making their claim, then the questions which may be presented to you-- and again I say these may be questions of law which his Honor will clarify for us-- you will then be called upon possibly to determine as to what if any responsibility my client, James, had under some provision in a document that the Gulf people are relying upon.

So that I think, I hope, that what I have said has helped at least outline the possible questions that will arise in this case. I am sure other counsel will have other things to say, and I don't want to preempt the whole show, so I will sit down. Thank you very much.

MR. DUBROWSKI: Mr. Justice Knapp, counsel for plaintiffs and defendants, Miss Paris and gentlemen and ladies of the jury:

My name is Dubrowski. I represent Beaman Corporation. At this time I guess basically you have heard a lot of talk here by attorneys and now you know why attorneys are sometimes called mouthpieces. We are basically the mouthpiece for our clients. I am the mouthpiece for Beaman Corporation.

But that is not what you are going to decide

this lawsuit on. You are going to decide on the facts you hear from there, exhibits, and any documents that go into evidence--not what you hear, basically; what you believe--to arrive at what really happened. Okay? And that's it. We are just mouthpieces topresent a picture to you, but you are not judging this case on us; you are judging it on the witnesses you believe, all right?

Now, who is Beaman Corporation and what are they doing here? Let's run down the whole thing, shall we?

The plaintiff has sued the owner of the property and Gulf and the lessee of the station, saying that something happened that was done wrong, that the work was done wrong--okay?--and that the ownership, the operation and the maintenance of the building was improper.

Gulf comes around and sues my client Beaman--I live near a street called Beamans, so every time I say Beaman I am going tosay Beamans, a slip. Okay?

They sued my client and United Porcelain saying the work was improperly done. And I in turn say, "Wait a minute, I didn't do any work; United Procelain did it." So I brought a cross-complaint against United Porcelain. That is why we have all these attorneys at the

table. And that is where we sit. Okay?

Basically you got to remember one thing with United Porcelain. They had two workers on this place. We are going to find that out in the testimony. The only two workers were the two plaintiffs back there. So if anybody did anything wrong, they are the people back there who did something wrong. That is what we are going to try to prove to you.

Basically, I am going to try to prove one other thing: I don't belong in this lawsuit. I don't know why I am here. The plaintiff in his opening just said I delivered goods. Mr. Furey in his opening I believe said that he hired suppliers and a specialist. And that is all that I did: I supplied to them. I supplied to them.

I am going to prove basically that we supplied the goods, they were delivered even before the plaintiffs got there. They were there waiting for them. That is all we did was deliver goods. We are going to prove that we didn't give any instructions, we didn't give any supervision; all we did was deliver goods to people who were supposed to know what to do with them.

And the installation was done by the plaintiffs in this lawsuit, who were the only workers for United Porcelain. If they did something wrong, then they can't

recover here. And if there was anything wrong with the goods, they were in the best position to see what was wrong with it, because they were the guys that were using it. They were putting up the brackets, they were putting up the overhang, they were putting up everything. They could inspect the goods, they could put them up, and they worked with them. And they claimed to be experts in this field. So if there is anything wrong with the material, they are the ones who should not have used it. But they used it, so it must have been okay.

Now there has been something said here about inspection of premises too, and I would like to say something about that, what we are going to prove here.

The plaintiff is going to prove that nobody inspected premises. We are going to prove somebody had an opportunity to inspect those premises: the plaintiffs. They were on that roof, theywere working. And yet they continued to work.

So I basically am going to prove two things: that Beaman does not belong in this lawsuit because they did nothing but supply materials that were satisfactory to these experts, alleged experts, who used them, that is number one; and, number two, I don't think the plaintiffs should recover against anybody.

I am going to ask you a question. I walked out of here yesterday and one of my colleagues said to me, "Do you think this jury is going to let this plaintiff recover against your client?"

MR. AUSUBEL: Your Honor, what his colleague told him certainly has nothing to do with this case.

THE COURT: Probably interesting but it has nothing to do with this case.

MR. DUBROWSKI: It is my wrap-up question. You are not going to let me say it? Okay. Thank you very much, everybody.

MR. HAUT: Good morning. My name is Irwin Haut. We represent the third-party defendant, United Porcelain. I will be brief. I am at the end of the line here and I know you are probably tired from hearing so many speeches.

In essence, as you have heard already, these were our employees on the job. The only people on the job of United Porcelain were these two men: plaintiffs.

As you also heard, we, United Porcelain, are not being sued directly by the plaintiffs but being sued by Gulf, defendant and third-party plaintiff. Gulf in effect is saying that if we are liable it was the fault of United Porcelain, and we are answering to that and, consistent with what you have heard Mr. Ausubel say for the

plaintiffs, the plaintiffs were skilled workmen, they worked on the roof, they did all their work in a proper, workman-like fashion and manner. They couldn't do-- and this you will hear this testimony-- that this work could not be done in any other manner other than the way the plaintiffs did this, and these were skilled people who knew what they were doing.

You have heard talk about ladders and other ways of raising these heavy lights, and you will hear testimony with respect to the impossibility of doing this work by use of these ladders, and the utter impossibility of doing it in any other way other than the way the plaintiffs have done the work.

In substance, then, I can't add any more to that. I just ask you to keep an open mind to the end of the case, and that I trust that you will bring a fair verdict in, in this case. Thank you.

THE COURT: Ladies and gentlemen, you remember that I prophesied by the end of the case all the chips would have fallen into place and you will find you have very manageable questions to decide. Well, unless you people are much smarter than I am, that hasn't happened yet. But I think you will probably begin to see the parameters, and I again renew my prophecy, by the time

the case is submitted to you you will have very manageable questions to decide.

You may proceed.

MR. AUSUBEL: If your Honor please, I would first like to start reading some depositions, and with your Honor's permission, I would like my associate to act in the role of the witness, and I will ask the questions.

THE COURT: May we stipulate that the court reporter need not take down the depositions but they will be--are you going to read them as they are?

MR. AUSUBEL: Yes.

I am not going to--I have some--

THE COURT: Are you going to skip around?

MR. AUSUBEL: Not too much, but there will be some that I consider immaterial and material.

THE COURT: Then I guess you had better go ahead.

MR. AUSUBEL: I will denominate the depositions as we go along.

THE COURT: As to these depositions, ladies and gentlemen, perhaps I should mention, under our procedures before the case goes to trial either party has the right to take testimony before a notary public and a court reporter

of any witness, and they are cross examined exactly as they would be if they were here. Then if for any reason that witness is not available, or not any reason, but any reason recognized by the law that witness is unavailable, the testimony can be read as it will be now. For convenience we are having one lawyer read the answers and the other lawyer read the questions. But of course this gentlemen is not answering the questions; it is the witness who testified.

MR. AUSUBEL: The first deposition I would like to read is that of the defendant, L.P.W. Realty Company, by Lawrence Paul Wolf, which was held on October 27, 1970. There were various attorneys who appeared for the parties to the action at that time. I appeared on behalf of the plaintiffs, Mr. Nix appeared on behalf of the defendant Gulf, Mr. Glasser appeared on behalf of the defendant Joseph James, Incorporated, Mr. Zamzok appeared on behalf of Beaman, and Mr. Winokur appeared on behalf of Mr. Wolf.

Beginning at page 3, after Mr. Lawrence Paul Wolf was first sworn, the direct examination by Mr. Ausubel:

"Q What's your full name?

"A Lawrence Paul Wolf.

"Q Where do you live?

"A 300 East 40th Street

"Q In Manhattan?

"A Manhattan.

"Q How long have you resided at that address?

"A The last couple of years.

"Q What do you mean by that? When did you--

"A About four years.

"Q You have been living there since 1966?

"A Approximately.

"Q Where did you live before that, sir?

"A 55 East End Avenue.

"Q In Manhattan?

"A Yes, I think it is '70.

"Q Do you have a business address?

"A 211 East 43rd Street.

"Q In Manhattan?

"A Manhattan.

"Q What is the nature of your business, sir?

"A Investments.

"Q Do you do business under any name?

"A Yes.

"Q What name do you do business under?"

MR. DUBROWSKI: I am going to object to this,

your Honor. I don't think the next question and answer has anything to do with this lawsuit.

THE COURT: What line?

MR. AUSUBEL: I was up to page 5, line 7.

Your Honor, here is another copy.

THE COURT: What's the objection?

MR. DUBROWSKI: I don't think it has anything to do with this lawsuit, your Honor.

THE COURT: What's the relevance?

MR. AUSUBEL: I only wanted to get to his association with L.P.W. Realty Company.

MR. DUBROWSKI: It is on the next page.

MR.AUSUBEL: I will go to page 5, line 22.

THE COURT: All right, skip to line 22.

"Q Were you in any way associated with L.P.W. Realty Co.?

"A Yes.

"Q Are you still associated with them?

"A Yes.

"Q In what capacity are you associated with that company?

"A President.

"Q Have you always been the president of that company as far as you know?

"A Yes.

"Q How long has that company been in existence?

"A Since approximately 1956."

Now go to page 7, at the sixth line.

"Q Do you have any stock interest in that company?"

And the answer appears at page 7, line 11.

"A L.P.W. Realty Co., Inc.-- no, Realty Corp. is the correct name of the corporation which had title to the real property at 2153-2159 Eighth Avenue and 301 West 116th Street.

"This corporation was later on merged into another corporation.

"Q When you say later on--

"A Subsequent to -- not to the litigation, but subsequent to the time that it acquired title to the real property it was merged into a corporation known as 43rd Street Estates Corp.. I was the sole stockholder in L.P.W. Realty Corporation and I am a majority stockholder in 43rd Street Estates Corp..

"Q Mr. Wolf, when did L.P.W. Realty Co. purchase 2153 Eighth Avenue, in Manhattan?

"A Prior to April '57.

"Q About when?

"A '55.

"Q Do you have a record which would indicate the precise date the deed was --

"A I presume so. It would be on the record. I think you can make a search."

MR. AUSUBEL: Your Honor, the date wasn't furnished to us and I don't know that it is terribly material.

THE COURT: I don't see that it is material.

MR. AUSUBEL: Line 16:

"Q Has L.P.W. Realty Co. since it acquired title to 2153 Eighth Avenue, Manhattan, transferred by deed its interest, its fee interest in that property, the ownership interest in that property?

"A On record?

"Q Yes.

"A The real property, the title to the real property located at 2153 Eighth Avenue, in New York County, has not been transferred by L.P.W. Realty Co. from the date it acquired title to this date. And it is still the owner of record of this property.

"Q Mr. Wolf, did there come a time when L.P.W. Realty Co. entered into a lease in connection with the property located at 2153 Eighth Avenue, in Manhattan?

"A Yes.

"MR. WINOKUR: I have a photostat of the lease.

"MR. AUSUBEL: May we have this marked as Plaintiffs' Exhibit #1 for identification?"

At this time, if your Honor please, I offer in evidence that exhibit, which was then marked as Plaintiffs' Exhibit 1 for identification.

THE COURT: You are now offering it as Plaintiffs' Exhibit 1?

MR. AUSUBEL: Well, there have been previous exhibits. I think this is Plaintiffs' Exhibit 3.

(Plaintiffs' Exhibit 3 marked for identification.)

THE COURT: Any objection?

Received.

(Plaintiffs' Exhibit 3 received in evidence.)

THE COURT: If you can do this, why don't you just read, every time it says Plaintiffs' Exhibit 1 for identification in the transcript, just read it, Plaintiffs' Exhibit 3, and that will make it clearer.

MR. AUSUBEL: In evidence.

THE COURT: In evidence. Just don't translate it; just use the words, "Plaintiffs' Exhibit 3 in evidence," every time you see Plaintiffs' Exhibit 1 for for identification.

"MR. AUSUBEL: The lease is dated April 1, 1957. Plaintiffs' Exhibit 3 is a lease dated April 1, 1957 between L.P.W. Realty Corp. as lessor, and Gulf Oil Corporation as lessee.

"Q At the time when you entered into this lease which is marked Plaintiffs' Exhibit 3, was there any building then on the premises 2153 Eighth Avenue, in Manhattan?

"MR. WINOKUR: Was it vacant land you bought or did you buy buildings?

"THE WITNESS: We bought a building.

"Q What kind of building was then on the premises of 2153 Eighth Avenue when you purchased it?

"A A four-story tenement. Three or four of them.

"Q Was that building on that premises ever torn down before you entered into this lease dated April 1, 1957 which has been marked as Plaintiffs' Exhibit 3 ?

"A I think pursuant to the lease it was torn down and a gas station built. This is what they call a lessor built station.

"MR. WINOKUR: The lease calls for the building to be constructed by the owner, I imagine, and turned over to the tenant.

"THE WITNESS: It is right in there.

"Q Do I understand then your corporation built this gas station for Gul Oil Corporation?

"A Right.

"Q Were these plans which were submitted by Gulf Oil Corporation for the construction of the building?

"A No, we submitted the plan to Gulf and got it approved.

"Q Do you have the plans which you submitted to Gulf for approval?

"A I don't know. I don't think so. But they would be -- they could be found in the building department. Those were the plans it was built from.

"Q Do you recall at this time who actually did the construction of this building, this service station?

"A L.P.W.

"Q Did L.P.W. retain any person or corporation to construct this building?

"A No.

"Q Did you personally have anything to do with the construction of this building?

"A Yes.

"Q What did you have to do with the construction of the building, sir?

"A I saw that it was built.

"Q Did you supervise the construction?

"A No, I think at that time I had a superintendent.

"Q Do you know who that superintendent was who supervised the construction of this building?

"A Victor Rendina.

"Q What was his occupation?

"A Supervisor of the building."

Now, going to line 15.

"Q Do you personally have any knowledge of the nature of the building that was put up, the type of construction that was involved, the type of coping or cornices that were involved, or things of that nature?

"A No.

"Q Have you any familiarity with the details of the actual construction?

"A No.

"Q Were you present there at the time when the building was going up?

"A I visited it a number of times.

"Q Did you personally have anything to do with supervising the construction of that building?

"A No.

"Q Did the Gulf people have any people down during the course of construction to supervise the work,

do you know?

"A No.

"MR. WINOKUR: No, you don't know or --

"THE WITNESS: I don't know whether they came down or not.

"Q Had you ever had a similar arrangement with Gulf before this building was constructed?

"A We built ten buildings like this.

"Q For Gulf?

"A For Gulf. Maybe more. But at least ten.

"Q Was this the first or the middle of these ten, or just which number was this one of the ten that you built for them?

"A I wouldn't know. But I know that there was a group leased to them at one time. If you will notice this one has got a mark as to the number of the station.

"Q You mean mark over here in the upper-righthand corner?

"A Yes. That's T.I.A. This is G-1.

"Q Which means what?

"A I don't know.

"Q That meant the first gas station?

"A I don't know.

"Q Do you have any records which would reflect which building this was chronologically of the group of

buildings that you built for Gulf?

"A I think you could find that in the building department."

Line 16:

"Q Instead of giving us the list, would you indicate for us whether this was the first of the group of buildings that you had constructed, or the second, or the third, or what have you; will you do that when you execute the transcript?

"A That's a mammoth job. You have to go in back of every building department. How else would you know?"

Go to page 15, line 5.

"Q Was L.P.W. Realty Corporation in the construction business?

"A For its own account.

"Q Did it do any building for anybody else?

"A No.

"Q How many buildings did L.P.W. Realty Corporation build for its own account?

"A Eight, ten, more or less.

"Q Over what period of time?

"A From about '55 to '57.

"Q Was L.P.W. Realty Corporation paid by Gulf Oil Corporation for the building that was put up at

2153 Eighth Avenue?

"A No.

"Q Did Gulf Oil Corporation approve of the materials as well as the plans that were used in connection with the construction of this building, sir, at 2153 Eighth Avenue?

"A I don't remember.

"Q About when was this building under construction?

"A About '57, '56.

"Q How long did it take to build the building?

"A The normal length of time.

"Q Which is what?

"A 120 days.

"Q Was this lease dated April 1, 1957 executed before or after the construction of the building, or during the course of construction?

"A I don't know. The lease would tell you.

"Didn't the lease give you a date and then doesn't it tell you that it commences as of the building? I think that's what it says.

"Q Do you have any record which would indicate the date that the construction of this building was completed?

"A You mean on the Certificate of Occupancy?

"Q Do you have the Certificate of Occupancy?

"A If I don't, it is on record in the building department."

Go to page 17, line 3.

"Q After the building was constructed did you turn over the building to the Gulf Oil Corporation?

"A Yes.

"Q About when was that, about?

"A April, '57.

"Q Do you know whether any architect was employed in connection with the preparation of the plans which were used in the construction of this building?

"A Sure.

"Q Do you know who that architect was?

"A Yes.

"Q Who is that?

"A Lama Proskauer & Prober. It is now Lama & Vasilotti.

"Q Who retained this architect?

"A I did.

"Q Mr. Wolf, following the execution of this lease dated April 1, 1957, which has been marked as Plaintiffs' Exhibit 3, did L.P.W. Realty Corporation, or

anybody on its behalf ever make any repairs to the premises?

"A We may have.

"Q What repairs did you make to that premises, and when?

"MR. WINOKUR: Give him the last time, if you can remember.

"A I don't remember ever making any repairs. But if we did, the only repairs that we would make would be to the roof, and we might have repaired the roof, I don't know.

"Q Do you have any record or records which would reflect what repairs your company made, if any, to the roof of this premises?

"A Only what's required under that lease.

"MR. WINOKUR: He asked you if you have any records.

"THE WITNESS: No.

"Q Now do you have any recollection now whether any person on behalf of L.P.W. Realty Co. ever made an inspection of the premises after the lease was executed? After the lease was executed and the building completed and turned over to Gulf Oil?

"A And accepted by Gulf--

"Q Yes.

"A We made no more inspections.

"Q Do I understand then correctly that once the building was turned over to Gulf Oil Corporation--

"A And accepted by them.

"Q (Continuing) -- and was accepted by them, which you say took place sometime in 1957, is that correct?

"A Or '58.

"Q That from that point on neither you nor any person on behalf of your corporation, L.P.W.--

"A Would walk on the same side of the street.

"MR. WINOKUR: Just give him an answer.

"Q (Continuing) -- ever went to the premises, examined the premises, or inspected the premises in any shape, manner or form, is that your testimony, sir?

"A Yes.

"Q Do I understand from that day on your company never made any repairs to the premises, is that correct?

"A We may have.

"Q Do you have any specific recollection or record which would indicate whether you in fact did make any repair from the date that the building was turned over to Gulf in either 1957 or 1958?

"A No, I think Gulf would have that record.

"Q What about your company?

"A No.

"Q If you did make a repair you say it would have been to the roof, is that correct?

"A Right.

"Q Would you have any idea about when any repair was made to the roof?

"A No. I don't even know if it was made.

"Q Is there anything in this whole world which would refresh your recollection as to whether any repair was made to the roof of the premises by or on behalf of your company following the date that the building was turned over to Gulf?

"A To the roof?

"Q Yes.

"A Yes.

"Q What would refresh your recollection?

"A My record.

"Q What kind of record is that?

"A We would ask the prevailing roofer, ask him for his record.

"Q Who was that?

"A Possibly Phil Bellet, Phil.

"Q Have you ever checked with Mr. Bellet, or

WCpa "Wolf-direct 149

whoever it was that was the roofer, as to whether any repair was ever made to this building after you turned the building over to Gulf?

"MR. WINOKUR: To the roof of this building?

"MR. AUSUBEL: Yes.

"A No.

"Q Other than Mr. Bellet's record, is there any other record in this world which would refresh your recollection as to whether your company ever made any repair to the roof of the building?

"A Gulf's.

"Q Did you ever check with Gulf as to whether they had any record of any repair to the roof after you turned the building over to it?

"A No."

Go to page 22, line 15.

"Q Do you still have some business relationship with this roofer?

"A Yes.

"Q Do you still have some business relationship with Gulf?

"A Yes.

"Q How many buildings do you have under lease to Gulf, about?

"A Ten.

"Q That is still in effect as of now, sir, is that correct?

"A Yes.

"Q When these repairs were made to the roof, if any, would they have been done at the request of Gulf?

"A Yes.

"Q Do you as a landlord have any direct dealings with any franchises, or subleases of Gulf?

"A No.

"Q Did your company have anything to do with inspections or repairs to the coping on the roof of the buildings involved on 2185 Eighth Avenue, in Manhattan?

"A No.

"Q From the time that you turned it over to Gulf?

"A No."

Line 25.

"Q Did your company lease out the entire premises of 2153 Eighth Avenue, to Gulf Oil Corporation?

"A Yes.

"Q Did you retain any portion of the premises for yourself or anybody else?

"A NO.

"Q So as I understand it then, you built it for Gulf, is that correct?

"A Yes.

"Q At Gulf's request, is that right, that is with its approval?

"A Yes.

"Q And you then leased out the entire premises to Gulf, is that correct?

"A Right.

"Q Did you have any persons who went down to the premises to collect rent?

"A No.

"Q Did you have any persons who went down to the premises to make any inspections whatsoever other than on the objections when Gulf asked you to make repairs to the roof?

"MR. WINOKUR: If they did.

"Q If you made such repairs.

"A I had no people."

Go to page 25, line 19.

"Q Were you aware of the fact that some arrangements were made by Gulf Oil Corporation for a modification or alteration of the structure sometime in 1966?

"A No.

"Q Were you ever requested or consulted by Gulf concerning such changes.

"A No.

"Q Did you ever consent to have any alterations made to this building, either orally or in writing?

"A It is in the lease.

"MR. WINOKUR: He asked you whether you specifically consented. His answer is right, he might say consented to in the original lease.

"Q Where did you consent to it in the original lease?

"MR. WINOKUR: Is there a provision they are entitled to make alterations without your consent?

"THE WITNESS: Yes, it is in there.

"Q Your attorney has directed my attention to paragraph 15 of the lease, and there is a provision in here, 'However, before making any alterations or changes to any building, lessee shall first obtain the written consent of lessor which consent shall not be unreasonably withheld.'

"Did your company, or you, ever receive any request from Gulf Oil Corporation, or on behalf of Gulf Oil Corporation to make any alterations or improvements to

this building after you turned the building over to Gulf?

"A Not that I personally know of.

"Q Does your company have any record which shows any such request to have been made by Gulf Oil Corporation of you or your company?

"A Leave a blank and I will find out.

"Q If there is a record, would you annex a photostatic copy of each such record, would you do that, sir?

"A Sure.

"Q And if there is no such record, would you so indicate in the transcript?

"A Yes."

I read the rider which was furnished to us in connection with that answer.

"A They never obtained our consent to any alterations or changes to the building and we would never have consented to any alterations unless we first checked the building thoroughly to see that it was safe to make the proposed alterations.

"Q Do you have a copy--"

MR. FUREY: Your Honor, at this point I move to strike that out since it was not said in the presence of counsel for Gulf, there was no opportunity for cross

examination. I don't think these self-serving declarations are any part of an examination before trial.

THE COURT: Motion granted.

MR. AUSUBEL: May I be heard in that regard, your Honor?

THE COURT: Yes.

MR. AUSUBEL: It was with the consent of all counsel that we consented that this deposition as well as others be supplemented by riders. If there was an objection raised at that time to the insertion of a rider, if they wanted an opportunity for examination, it should have been asserted then, or else I suggest to your Honor there is a waiver of the right to examine with respect to that additional information. That is true not only in this deposition but others as well, including his client's.

MR. FUREY: May I say, your Honor, this is the first time I have heard that, of riders, since my copy of the deposition is blank. But in any event, the prejudicial portion of the answer which is self-serving is not even responsive to the question, and to say that they can leave a blank in the transcript and fill in everything they want to and consider it testimony under oath I think is rather far-fetched.

THE COURT: Was the rider submitted to Gulf?

MR. AUSUBEL: The rider was submitted to us, and I assume that it was submitted by the lawyer who represented that litigant to the other litigants in the case.

MR. WINOKUR: May I be heard on that? I can't say that I gave this to any other attorney. I gave it to the plaintiffs' attorney, because it was the plaintiffs' deposition. I can't honestly say I gave it to them.

THE COURT: Then Gulf isn't bound by it.

MR. WINOKUR: I would say this much: From my point of view, whether Gulf is bound or not is not my concern, really, but I would say to your Honor that it was agreed at the time that I would furnish the attorney to the plaintiff, a space left blank for that purpose; I furnished it on a rider rather than in the blank space, but I did furnish the attorneys with our understanding and agreement. That is what happened.

THE COURT: You didn't furnish it to Gulf. Gulf is not bound by it.

MR. AUSUBEL: Your Honor, this was the stipulation at that time.

THE COURT: I understand but it is your

responsibility to see that Gulf hears about this, and if Gulf didn't hear about it, they are not bound by the rider.

MR. AUSUBEL: This is not the first time we have apprised Gulf of this information.

THE COURT: He says he never heard of it.

MR. AUSUBEL: Well, he personally may not have heard of it.

MR. FUREY: I said it is not in my copy. I understand it would be the claim of L.P.W. Realty.

MR. AUSUBEL: This has been told to the representative of Gulf for several years now.

THE COURT: I don't see that it has any relevance to the case anyway, that they claim they would have done it if they had known.

MR. AUSUBEL: Will your Honor permit in evidence so much of the answer which indicates that they did not get the consent--

THE COURT: Yes.

MR.AUSUBEL: --of the owner.

THE COURT: Yes. I will admit that.

MR. DUBROWSKI: For what it is worth, your Honor, my copy is unexecuted and none of the blanks have been filled in.

THE COURT: Anyway, there is no question, as I understand it, that they didn't get the consent of the owner, and so that is admitted. If they had been asked is struck from the record. I don't see it is relevant anyway, what they would have done.

MR. AUSUBEL: Go to page 28, line 12.

"Q Do you know that there were changes made to the building by Gulf?

"A No.

"Q Did you know, were you ever informed that Gulf intended to retain some contractor or contractors, to modify the building in any way?

"A In what respect?

"Q Well, in any respect.

"A No.

"Q Do you personally have any recollection of ever speaking to anybody from Gulf, or writing to Gulf concerning any request for--"

THE COURT: Isn't this conceded that they didn't?

MR. AUSUBEL: Yes.

THE COURT: Why go through all this deposition?

MR. AUSUBEL: All right.

THE COURT: If it is a conceded fact.

MR. AUSUBEL: Go to page 30, line 13.

"Q Now, following the execution of Plaintiffs' Exhibit #3, I take it that Gulf Oil Corporation paid you the rental each month as provided in Paragraph 3A of this lease, is that correct, sir?

"A Yes.

"Q And they have been paying it to you directly since that time, is that correct?

"A They have been paying it to me ever since.

"Q You don't get any rent from any franchise or sublessee, do you?

"A No.

"Q Gulf pays it?

"A Gulf pays the rent.

"Q Were you ever advised that Gulf had franchised out or sublet out the premises located at 2153 Eighth Avenue, New York County, after the execution of Plaintiffs' Exhibit 3?

"A I took it for granted, it is the nature of the business."

Line 13.

"Q In addition to paying the rent, did Gulf Oil Corporation also pay the taxes on the property?

"A Yes.

"Q Did they also pay the bills for the consumption of gas, electricity and water on the property?

"A That I wouldn't know. Oh, they pay for everything. That's what they call a triple net lease.

"Q Following the execution of this lease which has been marked Plaintiffs' Exhibit # 3, did you have any correspondence with Gulf Oil Corporation?

"A With reference to what?

"Q In reference to the maintenance, or management, or the operation of the buildings.

"A No."

MR. AUSUBEL: That concludes that deposition, your Honor.

THE COURT: I think we'll have to take a break for the court reporter. We have to remember we have all been working intermittently; the court reporter has been working right along. He needs a rest. Take a ten-minute recess.

(Recess.)

(In open court, jury present.)

MR. AUSUBEL: If your Honor please, I now propose to read from the deposition of the defendant, Gulf Oil Co. by Lincoln R. Wiese. I must confess, your Honor, I only have two copies.

THE COURT: All right.

MR. FUREY: Your Honor, before going into that, there were a few questions which were omitted by Mr. Ausubel on the previous deposition which I would like to read at this point if I may.

MR. DUBROWSKI: I will be the witness.

MR. FUREY: Mr. Dubrowski has volunteered to be the witness if we may, your Honor.

THE COURT: Can't we use the same witness?

MR. FUREY: Oh, I can do that.

THE COURT: Just give him the page.

MR. FUREY: Page 11, line 23. This question has already been read, but it will give us the context of the questions that I want to read, your Honor.

"Q Do you know who that superintendent was who supervised the construction of this building?

"A Victor Rendina.

"Q What was his occupation?

"A Supervisor of the building.

"Q Was he a technically trained person?

"A Yes.

"Q Trained in what?

"A Engineering, construction.

"Q Do you know where he comes from?

"A He came from I guess Italy.

"Q I mean where is he associated, with whom is he associated?

"A He was associated with me for ten years.

"Q Where is he now?

"A I don't know."

MR. FUREY: On page 31, again reading a question, if I may, your Honor, which has previously been asked to get the context of the one which was never in.

THE COURT: Yes.

MR. FUREY: Page 31, line 3.

"Q Were you ever advised that Gulf had franchised out or sublet out the premises located at 2153 Eighth Avenue, New York County, after the execution of Plaintiffs' Exhibit 3 for identification?"

MR.AUSUBEL: That is in evidence.

"A I took it for granted, it is the nature of the business.

"Q But were you so advised by Gulf?"

Off the record, excuse me.

"A I would never get specific notice."

MR. FUREY: Thank you, your Honor. That is all I have.

MR. AUSUBEL: Anybody else want to read?

This is the deposition of the defendant, Gulf Oil Corporation, by Lincoln R. Wiese, which was taken on June 18, 1970. There were various attorneys that appeared for the parties. Mr. Wiese was first sworn, and then I conducted an examination of him beginning at page 4.

"Q What is your full name?

"A Lincoln R. Wiese.

"Q Where do you live, sir?

"A 31 Dartmouth Street, Rockville Centre.

"Q Your home phone number?

"A 536-4259.

"Q Mr. Wiese, by whom are you employed?

"A Gulf Oil.

"Q Where do you work out of, what place of business?

"A The Bronx.

"Q Where?

"A Chatterton Avenue in the Bronx.

"Q What is the address?

"A 2417 Chatterton Avenue.

"Q Mr. Wiese, what is your title with Gulf?

"A Sales representative.

"Q What are your duties as a sales representative?

"A Have you got an hour and a half?

"Q In general.

"A I manage a territory.

"Q In connection with the territory that you manage what are your duties?

"Do you go to service stations within the territory, Gulf Service Stations?

"A Right.

"Q What are you supposed to do in connection with the Gulf Service Stations in your territory?

"A See that the condition of them is kept up, sell whatever products we have, merchandise.

"Q Is it one of your duties in connection with seeing to it that the condition of the various service stations is kept up to inspect the various Gulf Stations within your territory?

"A For cleanliness, right.

"Q Do you make any inspections in connection

with the physical condition of the area of the service station, the Gulf Service Station?

"A What do you mean by 'physical'?

"Q I mean apart from cleanliness do you make any inspections concerning the physical condition of the service station, the building or the pumps or anything else in it--

"A Not really. It is usually brought to our attention by the dealer.

"Q Apart from any complaints that the dealer might make to you do you make any independent inspections to determine the physical condition of the Gulf Service Station?

"A No regular inspections. I might just look it over and if I see something wrong --

"Q Do you make regular inspections of the service stations within your area?

"A Not for physical defects, no.

"Q Does anybody on behalf of Gulf make any inspections concerning the physical conditions of the service stations?

"A It would be up to us, really.

"Q Who would have the responsibility of making such an inspection on behalf of Gulf?

"A I don't know of anybody who has that responsibility. "

Line 21.

"Q How long have you had this title with Gulf?

"A Roughly fifteen years.

"Q During the past fifteen years have you had a specific territory to handle?

"A Any territory.

"Q In the year 1966 did you have a specific territory to handle?

"A Yes.

"Q What was the territory that you had in 1966?

"A I don't recall.

"Q Do you recall a service station, a Gulf Service Station, located at 2153 Eighth Avenue in Manhattan?

"A No.

"Q Did you ever see that service station?

"A Yes.

"Q When had you seen that service station?

"A Last year.

"Q That would be in--

"A 1969.

"Q Had you ever been there before that?

"A No.

"Q Do you know who was the sales representative that handled that service station located at 2153 Eighth Avenue in Manhattan on June 28,1966?

"A No.

"Q Is there a record of Gulf which would indicate--

"A There would be a record.

"Q Did you check that record before you came down today?

"A No.

"Q Did Mr. Beckett have anything to do with that service station?

"A Not that I know of."

THE COURT: What's the relevance of all these questions? What are you trying to establish?

MR. AUSUBEL: We are trying to find out who was the service representative.

THE COURT: Haven't you found that out yet?

MR. AUSUBEL: At that point we hadn't.

THE COURT: Have you found it out now?

MR. AUSUBEL: Yes.

THE COURT: Why don't you tell us, why go through all this rigamarole to find out.

MR. AUSUBEL: It was subsequently represented to us and I will read that gentleman's deposition.

THE COURT: I mean, what point has all this got?

MR. AUSUBEL: There are some things which are germane generally.

THE COURT: Let's get to something important. I mean, we want to get rid of this case.

MR. AUSUBEL: Page 10, line 18.

"Q Mr. Wiese, in 1966, was there any other person in the Gulf organization besides the sales representatives who would regularly visit the Gulf Service Stations?

"A Not that I know of.

"Q There was a Gulf Service Station located at 2053 Eighth Avenue in Manhattan for some years before you visited that station, according to the records of Gulf, is that correct?

"A According to the records, yes.

"Q When did the Gulf Oil Company first have a service station at that premises?

"A I don't recall the date when they first had it.

"Q Is there some record that would indicate when they first had a service--"

THE COURT: Why go into all this? Do you know what date it is?

MR. AUSUBEL: It is right here, your Honor.

THE COURT: Tell the jury what the date is and get onto the next point.

MR. AUSUBEL: March 12, 1957.

Page 13, line 21.

"Q Is the Gulf emblem placed on the service station after it is constructed?

"A What do you mean by Gulf emblem --

"Q The name of Gulf, with the picture and colors?

"A Yes.

"Q You make this fairly uniform, don't you, all of your service stations?

"A Fairly uniform, yes.

"Q With Gulf pumps?

"A Right.

"Q And Gulf signs advertising to the public?

"A Yes.

"Q That the Gulf products are being sold?

"A Right.

"Q Once the service station is concluded, is it fair to say that only Gulf products are sold, that is,

in terms of oil or gas?

"A Yes."

Page 15, line 10.

"Q In 1966 who was the person that was in the premises as a franchisee or person to run the --

"A A person by the name of James.

"Q Did you know James?

"A Not at that time.

"Q Do you have any document which would show when James was first designated by Gulf to be in that service station?

"MR. NIX: We furnished you with the lease."

At this time, if your Honor please, I offer in evidence the various documents which have been referred to as the agreement between Gulf and Joseph James, Incorporated, three documents which had been marked then as Plaintiffs' Exhibits 2, 3 and 4 for identification in the deposition.

MR. BRILL : May I see them, your Honor?

THE COURT: Yes.

You are offering them as 4, 5 and 6?

MR. AUSUBEL: Yes, your Honor.

MR. BRILL: May I have the indulgence of the Court for a minute?

THE COURT: Yes.

MR. BRILL: I have no objection.

Do you have any spares of these?

MR. AUSUBEL: I got these from Gulf.

MR. BRILL: I know but you don't have any copies?

MR. AUSUBEL: No.

MR. FUREY: I have no objection.

MR. DUBROWSKI: I can't object.

THE COURT: Received.

(Plaintiffs' Exhibits 4, 5 and 6 received in evidence.)

MR. AUSUBEL: May I proceed, your Honor?

THE COURT: Yes.

MR. AUSUBEL: Go to page 21, line 15.

"Q In 1965 and 1966, the sales representatives, would they make out reports in connection with their inspections of the Gulf Oil Stations?

"A Yes.

"Q Were these reports in writing?

"A It would be verbally and in writing.

"Q Were there any records kept concerning the inspections made of the service stations within the territory of a sales representative?

"A Of which sales representative?

"Q Of any sales representative.

"A Sure there are records kept.

"Q What are those records called?

"A They could be called anything. They could be written on anything. It could be written on a plain piece of paper.

"Q But eventually, after they are written on any piece of paper, are they kept in some file of the Gulf Oil organization, a maintenance file or an inspection file?

"A They are just kept in the dealer location file.

"Q There is a dealer location file?

"A Yes.

"Q Does this dealer location file contain all of the documents concerning maintenance and inspection of a particular service station?

"A I would think so.

"Q Have you produced the dealer maintenance file concerning the gas station, the Gulf Gas Station located at 2153 Eighth Avenue in Manhattan?

"A No."

Page 23, line 8.

"Q Were you ever instructed by Gulf Oil Corp. to make any inspections of a roof?

"A No.

"Q Do you know anybody on behalf of Gulf who would make inspections of a roof of a gas station, a Gulf Gas Station in 1966?

"A No."

Line 23.

"Q Is there any record in the Gulf Oil organization of any inspection which was made to this Gulf Service Station at 2153 Eighth Avenue before June 28, 1966?

"A I don't know."

Line 6.

"Q When you go back would you check through your files and indicate in the transcript whether there are any records of any inspections having been made to the service station at 2153 Eighth Avenue, New York City, before June 28, 1966, and indicate yes or no; and if yes, annex to your transcript copies of all of the inspection reports of that station? Would you do that, sir?

"A Inspections regarding what?

"Q Inspections regarding that service station

or the physical condition of the building located at that service station or gas station, would you do that, sir?

"A Yes."

Now, may we have a concession that on the succeeding page there was an occasion that they had no records.

MR. FUREY: Right.

THE COURT: So conceded.

MR. AUSUBEL: Page 25, line 20.

"Q Was there a practice whereby in the Gulf Oil organization, whereby sales representatives were instructed as to what they were to do when they visited the Gulf Oil Stations which were within their territories?

"A Yes.

"Q What was the practice?

"A There were no definite instructions.

"Q What, generally?

"A Generally to see that it is kept clean, see that the products are displayed, see that the men are in uniform, see that the general aspect of the station is up to Gulf's image."

Line 17.

"Q Were you given any instructions with respect to the roof of the building as a sales representative?

"A No.

"Q Were you told anything as a sales representative by the Gulf Oil organization in the event there was any complaint made by the franchisee or person who was operating or running the station with respect to the roof what you were supposed to do?

"A Report it to the office.

"Q Would that report be made orally or in writing?

"A It could be either way.

"Q What would be done if there was such a report that there was something wrong with the roof?

"A It would be handled internally. I imagine they would have to find out whose responsibility it was."

MR. AUSUBEL: Will your Honor bear with me.

Page 35, line 5. Oh, I think all of this is unnecessary in the light of subsequent depositions.

THE COURT: All right. Anybody want to add anything to that one?

Do you have any more depositions?

MR. AUSUBEL: Yes, your Honor, I do.

Your Honor, this one I have three copies of. (Handing to the Court.)

MR. AUSUBEL: This is a deposition taken on the same day, June 8, 1970 of the Gulf Oil Corporation by Arnold E. Beckett.

MR. BRILL: Your Honor, before counsel reads this, I have had some second thoughts. May I be permitted atthis time to read from one of the exhibits-- it is either 4, 5 or 6-- that has been marked in evidence in the course of the reading of the past preceding deposition.

THE COURT: Oh, I don't--

MR. BRILL: Or would your Honor prefer that I read it at some other time?

THE COURT: I think we'll let counsel proceed with his case at this point.

MR. AUSUBEL: Page 4, line 4.

"Q What is your full name?

"A Arnold E. Beckett.

"Q Where do you live, sir?

"A 51 Spring Lane Drive, Blackwood, New Jersey."

Line 10.

"Q Mr. Beckett, what is your occupation?

"A At the present or at the time that this

happened?

"Q Both.

"A At the present I am a shipping foreman.

"Q For?

"A Gulf Oil.

"Q And you work out of where?

"A The Philadelphia terminal.

"Q Located where?

"A 30th and Penrose in Philadelphia."

Line 22.

"Q In 1966 what was your occupation?

"A Construction engineer.

"Q Are you an engineer by profession?

"A No, sir.

"Q Did you graduate as an engineer from any school?

"A No, sir.

"Q Did you ever study any engineering?

"A Very little.

"Q What was the extent of your training as an engineer?

"A Mostly working in construction.

"Q How much education did you have?

"A You mean as far as engineering?

"Q Anything, for that matter.

"A I graduated high school.

"Q Did you go on to college from there?

"A I started.

"Q And?

"A Quit.

"Q How long?

"A One semester.

"Q How long have you been working for Gulf?

"A Five years.

"Q When you went to work for Gulf did you go to work as a construction engineer?

"A Yes, sir.

"Q Was this in 1965?

"A Yes,sir.

"Q About when in '65?

"A April.

"Q Were you working out of the same office in Philadelphia?

"A Not in the same office, but I was working out of the Philadelphia office.

"Q What was your job as a construction engineer, sir?

"A To see that the contract procedures were

followed, the specifications.

"Q You mean any contracts which Gulf may have made with contractors; is that correct, sir?

"A Yes.

"Q Did your work involve Gulf stations?

"A Yes, sir.

"Q Was that the extent of your work?

"A Stations and terminals.

"Q Specifically in 1966 what would your job be as a construction engineer, sir, with respect to Gulf stations?

"A I inspect and see that the contractor built the station according to the plans and specifications.

"Q Which are drawn up by whom?

"A Various architects.

"Q Who are hired by whom?

"A By Gulf.

"Q Who would make a decision when a station would be the subject of repair or renovation?

"A I don't know.

"Q Would somebody in the Gulf organization?

"A Yes.

"Q Then after such a decision was made by somebody in the Gulf organization you would be told about

that decision, is that correct, sir?

"A I would be told once a contract had been negotiated and everything.

"Q Who would tell you that, normally?

"A The engineering office.

"Q That is the Gulf engineering office?

"A Yes.

"Q In Philadelphia?

"A Yes, sir.

"Q Are all of the engineering operations of Gulf operated through Philadelphia?

"A Yes, sir.

"Q Was that true in 1966?

"A Yes, sir.

"Q After that was told to you then it was the construction engineer's responsibility to see to it that plans be drawn by architects and that the work be done by contractors under your plans and specifications and supervision?

"MR. NIX: No, no, I will object to the form of the question.

"A No.

"Q What would your responsibility be once you were notified of the contract being executed for a

remodeling or repair or construction of a gas or oil or service station?

"A Just to meet with the contractor and get the job started, and continue it until it was completed.

"Q If a decision was made to repair a service station were you given any instructions as to what inspections, if any, you were to make of the premises before work would be undertaken?

"A No.

"Q To your knowledge was there anybody in the Gulf organization who would go to the service station or gas station proper, the Gulf station, to inspect the station to determine the condition of the station?

"MR. NIX: That is, before--

"MR. AUSUBEL: Before the work is undertaken.

"A No.

"Q Do you know of any such procedure which Gulf had in 1966 to have any inspection made of the service station before the contract was let?

"A No, sir.

"Q Did there come a time when certain work was done at a gas station which was located, a Gulf Gas Station and Service Station, located at 2153 Eighth Avenue in Manhattan?

"A Yes, sir.

"Q Do you have with you the records concerning that gas station, that Gulf station?

"MR. NIX: The records of the letting of the contract?

"MR. AUSUBEL: And the work that was done.

"A Yes, I think so.

"Q By the way, had you ever been to that service station at 2153 Eighth Avenue, Manhattan, before the work was done?

"A No, sir.

"Q Have you ever been there?

"A Yes, sir.

"Q When were you there?

"A When it was completed.

"Q When was that?

"A I don't have the exact date,but I wrote a letter--

"MR.NIX : Let me see that."

Then there was a discussion off the record.

"A I really don't have a record of what date I was there.

"Q About when?

"MR. NIX: Don't guess at it.

"Q Were you there in the year 1956?

"A Yes, sir.

"Q Were you there in the month of June, 1966?

"A That I don't know.

"Q Was there any record which would indicate when you were there?

"A There should be a record of the day I signed, that the job was completed.

"Q Did you come there after the work had been completed?

"A Yes, sir.

"Q Did anybody on behalf of Gulf go to that service station according to the records of Gulf, before the work was completed?

"A I don't know.

"Q Is there any record which shows that there had been somebody there before the work was completed?

"A Not to my knowledge.

"Q Do you know when the decision was made to let out a contract, for Gulf to let out a contract for the purpose of remodeling or renovating or reconstructing that service station?

"A On 12/6/65."

Now, line 14.

"Q Do you have the records in connection with

that decision?

"A No, sir, just--

"MR. NIX: You mean the record of the first instrument in which the contract was --

"Q I want to know how did it come about that on December 6, 1965, that a decision was made for letting out a contract in connection with that gas station at 2153 Eighth Avenue, that Gulf Gas Station?

"A That I don't know who would make the decision on that.

"Q How did it come about, quite apart from who made the decision? Was there a decision made that itwas necessary to remodel or reconstruct or repair that service station at 2153 Eighth Avenue?

"A Necessary or -- you asked that it be necessary to be repaired; right?

"Q Was there a decision made that it was necessary to redo that service station or remodel it or repair it?"

There is a discussion among the lawyers. Then there is another question at page 13.

"Q Was there some decision made in connection with this thing by somebody in the Gulf organization?

"A There must have been, yes, sir.

"Q What was the decision that was made?

"A What was the decision?

"Q Yes.

"A To install a prefabricated overhang.

"Q Who made that decision?"

Now, at that time the answer was, "That I don't know." There was then inserted in ink--

"A Mr. Reuben, manager of Real Estate and Development.

"Q But somebody in the Gulf organization; is that correct?

"A Somebody.

"Q Is there any indication from your file as to who that somebody in the Gulf organization--"

THE COURT: Mr. Reuben. We have it.

MR. AUSUBEL: Yes. Just as a matter of habit I was reading the questions and answers without thinking.

Line 18.

"Q Is there anything in the file to indicate whether Gulf had made any inspection of the service station before that decision was made?

"A No.

"Q As a matter of practice before a decision like that is made is it customary for somebody in the Gulf

organization to make an inspection of the Gulf Service Station involved?

"A I don't know."

Now, go to line 22. Oh, I think I'd better read the preceding question.

"Q Who would know? Who in the Gulf organization would know that, referring to this specific service station at 2153 Eighth Avenue, and that decision.

"MR. NIX: If you know. If you don't know, say so.

"A I really don't know.

"Q When the transcript is completed would you please insert the name and title of the person who would know?

"MR. NIX: Who would make the decision --

"MR. AUSUBEL: That is right.

"MR. NIX: -- to renovate or alter the building?

"MR. AUSUBEL: That is right. That is number one.

"Q Would you also indicate in the transcript whether any inspection was made of the service station before or after the decision was made by or on behalf of Gulf, and if so, the date or dates of the inspection,

who made the inspection by name, address and title, what was revealed on the inspection, and if there are any reports in connection with such inspection, indicate yes or no, and if in the affirmative, annex copies of reports of such inspections.

"Would you do that, sir?

"A Yes."

There was then inserted in ink.

"No inspection was made, no dates are on record. No reports on record."

"Q Who told you about this contract?

"A My supervisor.

"Q Who was that"

"A Mr. Beschwitz.

"Q First name?

"A Ernest.

"Q What was his title?

"A Director of engineering.

"Q Was he a field man?

"A No, sir."

THE COURT: Was he a what?

MR. AUSUBEL: A field man.

"Q Were you a field man?

"A Yes, sir."

Line 8.

"Q Were there any field men in the engineering department or in any other operating departments whose function it was to go out to make inspections of service stations to determine whether contracts should be let out?

"A That I don't know.

"Q Do you know of any such persons?

"A No, sir.

"Q If there are or were such persons in the Gulf organization, in either the engineering department or operating department or any other departments, would you please tell us in the transcript in writing yes or no; whether there was such person in effect in 1965 and 1966, and if so, their title, their names and addresses, in connection with this very service station at 2153 Eighth Avenue in Manhattan?

"All right, sir?

"A Yes, sir."

There was then added in ink, "No inspection was made. No dates on record. No reports or record."

"Q What documents have you produced in connection with the work that was done at 2153 Eighth Avenue?

"MR. NIX: He has produced all of the documents which have been furnished to you and which you have copies of.

"Q Do I understand then that as far as you know this is the complete engineering or work file in connection with the renovation that was done at 2153 Eighth Avenue?

"A Yes, sir."

Photostats of that entire trial were then marked for identification as Plaintiffs' Exhibit 5. I would ask at this time to offer this group of documents in evidence as Plaintiffs' Exhibit 7.

THE COURT: Show it to counsel.

MR. DUBROWSKI: Your Honor, on this may we approach the bench?

(At the side bar.)

MR. FUREY: Your Honor, there is a certificate of compensation insurance that Mr. Ausubel has offered.

MR. DUBROWSKI: He is offering that in evidence, the plaintiff?

MR. AUSUBEL: No, no. This was the way it was--

THE COURT: What?

MR. AUSUBEL: I consent that this document be not part of the documents submitted. It has reference to--

what?-- liability and compensation?

MR. DUBROWSKI: Right, liability and comp.

MR. AUSUBEL: I would consent that this document is excluded.

THE COURT: All right.

MR. AUSUBEL: And there is one for liability as well.

THE COURT: I think counsel should be commended for their candor.

MR. AUSUBEL: The two sheets, both as to liability and compensation.

THE COURT: Why don't you decide what you want to take out?

MR. AUSUBEL: We'll take out these two men.

THE COURT: I think this makes your motion for a mistrial look a little silly.

MR. AUSUBEL: You know, in dealing with a case with lots of papers, things sometimes get past.

MR. DUBROWSKI: I have no objection.

MR. FUREY: I have no objection.

(In open court.)

THE COURT: The offer having been amended, the papers are received.

MR. DUBROWSKI: Before that, may I see one page,

please, number two, before you mark it?

THE COURT: Yes.

Why don't we just hold this up? You don't want to read this to the jury now, do you?

MR. AUSUBEL: No.

THE COURT: Hold this up. Reserve decision on that offer until counsel have had a chance to see it.

MR. AUSUBEL: If it is all right with your Honor, I will proceed now.

THE COURT: Yes, proceed.

MR. AUSUBEL: Page 19, line 8.

"Q Do you know what was eventually let out and to whom?

"A To install a prefabricated overhang on this service station at Eighth Avenue, and it was to the Beaman Corporation.

"Q Who was going to pay for this job?

"A Gulf Oil as far as I know.

"Q Was it Gulf Oil Corporation that hired Beaman Corporation to do the job?

"A Yes, sir.

"Q Did Gulf Oil Corporation hire an architect to prepare plans for that job?

"A Not to my knowledge.

"Q Was there an architect that prepared plans for that job?

"A A plot plan and paving plan.

"Q A what?

"A A plot and paving plan.

"Q What do you mean by that?

"A That is just a plan showing the location of the building at a specific place."

Now to page 21, line 21.

"Q Did you look at the roof of the building when you were there?

"A No, sir.

"Q Did you see the roof of the building at all?

"A No, sir.

"Q With respect to these plans, the plot plan and paving plan, who prepared those documents?

"A Joseph Mitchell.

"Q Who is Joseph Mitchell?

"A He is an architect here in New York City.

"Q Who hired him?

"A Gulf Oil.

"Q Did you look at those plans at all before the job was let out?

"A No, sir.

"Q Do you know if anybody in the Gulf organization looked at those plans before the contract was let out?

"A Somebody at engineering, I guess.

"Q Of Gulf?

"A Yes.

"Q In Plaintiffs' Exhibit--"

I forget now what number five is in evidence. Will you bear with me just a moment, your Honor-- it would now be Plaintiffs' Exhibit 7.

"Q In Plaintiffs' Exhibit 7--"

MR. DUBROWSKI: It is not in evidence yet.

THE COURT: Is that one of these? The one that you are holding. Do you have any objection to that?

MR. DUBROWSKI: Yes, sir.

THE COURT: You have an objection?

MR. DUBROWSKI: The objection I have is to page on top here as having any bearing on Beaman Corporation since they are not a party to the original action, the main action.

THE COURT: You say this is not admissible against Beaman?

MR. DUBROWSKI: Yes, sir, we are not a party to the main action.

THE COURT: But you are a party in the action

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between Gulf.

MR. DUBROWSKI: We haven't gotten that far yet, your Honor.

MR. FUREY: May I be heard, your Honor.

THE COURT: Yes.

MR. FUREY: Your Honor, the very purpose of an impleader is so that the case can be decided at one time with all the evidence. The evidence put in by the plaintiff we may or may not be relying upon in support of our third-party action. So under the circumstances whether it is on Mr. Ausubel's case or my case is immaterial. If there is a real objection to the documents, it should be explored. But the fact that he has offered it rather than I, I think is immaterial.

THE COURT: You join in the offer, I take it?

MR. FUREY: Yes, your Honor.

THE COURT: Then is there any other objection?

MR. DUBROWSKI: No, sir.

THE COURT: Received.

(Plaintiffs' Exhibit 7 received in evidence.)

"Q In Plaintiffs' Exhibit 7 there is a document headed, 'Instructions and Conditions.' What is that?

"A That is an instruction to the Beaman Corporation for the furnishing of materials, I would say.

"Q Do you know if this was given to Beaman?

"A Yes--"

MR. DUBROWSKI: Objection, your Honor. Again we are going into the same thing again. The plaintiff in this action is not suing Beaman Corporation but Gulf.

THE COURT: The whole thing will be before the jury in the end, so I don't think it makes any difference.

"A Yes, they should have a copy of it.

"Q Was it given to anybody else?

"A That I don't know.

"Q Is there any record that it was given to Beaman?

"A That I don't know.

"Q When you say that they should have a copy, referring to Beaman, on what do you base that answer?

"A I think it is a general practice that they receive these instructions.

"Q General practice for your company, Gulf, to give it to Beaman, is that correct?

"A Yes.

"Q Did you have a regular agreement with Beaman Corporation in connection with the remodeling of Gulf stations?

"A Yes.

"Q What kind of agreement did you have with them which was in effect in 1965 and 1966?

"A That they would install these prefabricated overhangs on existing buildings.

"Q In all of your service stations?

"A They didn't do it to all of them, just certain stations.

"Q Were there many stations which were involved in your practices with Beaman prior to this deal?

"A Several."

Line 9.

"Q Was there any written contract which was in effect between Gulf Oil Corporation and Beaman in connection with this very transaction involving 2153 Eighth Avenue?

"A Yes, sir.

"Q There was a written contract?

"A You mean a written contract for this specific station?

"Q Yes.

"A Just that purchase order there.

"Q Which is the second document dated December 6, 1965? Do I understand, then, that you have no independent written agreement besides what you claim represents the agreement incorporated in Plaintiffs' Exhibit 7?

Is that correct, sir?

"A That is right.

"Q After the contract was let out on December 6, 1965, did Gulf Oil Corporation through any of its employees or officials go down to inspect or look at the service station to determine the progress of the work?

"A Not to my knowledge, no.

"Q Who was the first person that went down to the service station after the letting of the contract on behalf of Gulf?

"A I was, I guess.

"Q That was after the completion of the job?

"A That is right.

"Q How were you notified of the completion of the job?

"A How was I notified of the completion of the job?

"Q Yes.

"A Usually I would receive a copy of a Beaman invoice to be paid in full.

"Q If you will take a look at Exhibit 7 you will notice there is an invoice dated January 6, 1966.

"Do you see that, sir?

"A Dated what?

"Q January 6, 1966.

"A That is just a proposal to do this work.

"Q That is a proposal --

"MR. NIX: That is Beaman's proposal.

"Q You got up a memorandum on April 5, 1966.

"Do you see that, sir?

"A Dated April the 5th, yes, sir.

"Q Did you prepare that document, April 5, 1966?

"A No, sir.

"Q Were you given a copy of that document?

"A Yes."

Line 20.

"Q What was the occasion for giving you the copy of the document dated April 5, 1966?

"A To inform me that this work was going to take place.

"Q Who was informing you of that?

"A Mr. Beschwitz.

"Q Mr. Who?

"A Mr. Beschwitz.

"Q He was your superior?

"A Yes, sir.

"Q Was that the first notice you had of this job?

"A Yes, sir."

Go to line 25.

"Q You knew that Beaman was not familiar with practices in New York City; is that correct, sir?

"A The Beaman Corporation is not a New York contractor."

MR. DUBROWSKI: Move to strike out the answer as not being responsive to the question, your Honor.

THE COURT: Motion denied.

"Q As far as you knew, on April 5, 1966, were they working in the New York City area?

"A The Beaman themselves?

"Q Yes.

"A No, as far as I know they weren't.

"Q Did you give Beaman any instructions with

respect to how this work was to be done?

"A I, personally?

"Q Or Gulf.

"A No, sir.

"Q Were any permits secured to do this work?

"A Yes, sir.

"Q Who did that?

"A Mr. Mitchell.

"Q The architect hired by Gulf?

"A Yes, sir.

"Q Was this done on behalf of Gulf?

"A Yes, sir.

"Q To your knowledge did anybody on behalf of Gulf ask the architect to check the condition of the roof or coping of that building which was to be remodeled?

"A Not to my knowledge.

"Q Was there any report given to you by the architect, Mr. Mitchell, that any such inspection was made by him or on his behalf?

"A Not to my knowledge.

"Q Is there anything in the construction file of Gulf to indicate that any such inspection had been made before this job was done?

"A I don't know.

"Q You don't know of any such report?

"A No, sir.

"Q You have produced with you the entire construction file of Gulf, is that correct?

"A Yes, sir.

"Q There is no such report in that file, is that correct?

"A No, sir.

"Q There are two negatives. You mean there is no such report in the file; is that correct?

"A Yes.

"Q After you got in memorandum of April 5, 1966 -- which I assume was at about that date; is that correct?

"A Within a couple of days.

"Q Did you or anybody on behalf of Gulf after this memorandum ever arrange to go down to the service station before the job was completed?

"A I delivered the permit there to the station.

"Q When?

"Would it be a matter of days after this?

"A It would be a matter of days after I received it.

"Q That would be sometime in April of 1966, is that correct, sir?

"A Yes, sir.

"Q When you delivered the permit to the service station whom did you give it to?

"A I can't really say. Usually I left it with the station operator and told him to keep it until the men showed up there to work.

"Q Did you tell the station operator when the men would be expected at the job site?

"A No, sir. Not what day.

"Q At that time when you went down there did you make any inspection at all of the roof of the premises?

"A No, sir.

"Q Were you told by Mr. Beschwitz or anybody from the engineering department to make any inspection of the roof of the premises?

"A Prior to construction?

"Q At the time when you were down there in April of 1966.

"A No, sir.

"Q Did you discuss with the operator on that occasion the condition of the roof of the premises which was going to be renovated?

"A No, sir."

Line 19.

"Q What was the conversation that you had with the operator in April of 1966 when you were there: as best as you can recall?

"A I just gave him the plans and the permit and told him that they would be there at some time in the near future, to install the overhang.

"Q What plans did you give him besides the permit?

"A A reproduction of the Beaman plan.

"Q Insofar as getting the permit was concerned, were you required to list who was doing the job, on whose behalf it was being done and the nature of the job?

"A That I do not know."

Line 17.

"Q Did your arrangement with Beaman, as far as you know, require that Beaman itself do the work?

"A No, sir.

"Q On other occasions before this did Beaman subcontract out the work or part of the work to be done?

"A Yes, sir.

"Q What work is Beaman involved in? What do they do?

"A They manufacture the overhang.

"Q Do they install the overhang?

"A In some areas, yes.

"Q In this particular job was there any arrangement had between Gulf and Beaman as to who would do the work after Beaman manufactured the overhang?

"A No, sir."

I go to 34, line 5.

"Q Was this overhang which is described in the memorandum dated December 9, 1965, to be an overhang that extended from the roof of the building?

"A Yes.

"Q Was this document dated December 9, 1965, which is part of Plaintiffs' Exhibit 7, given to Beaman on or about December 9, 1965?

"A Yes, sir."

Line 21.

"Q Do you know when this overhang was constructed in contrast with installed on the Gulf Service Station at 2153 Eighth Avenue in Manhattan?

"A If I understand your question, you want to know if I know when it was constructed prior to being installed?

"Q Yes.

"A It was fabricated sometime after March 30, 1966.

"Q Was it prefabricated before you got down to the gas station in April of 1966?

"A I don't know.

"Q Did you see it at the gas station at that time?

"A No, sir.

"Q Had any work as yet begun on the gas station when you delivered these documents to Mr. James?

"A No, sir.

"Q There is in this group of documents which has been marked Plaintiffs' Exhibit 7, a requisition for material, equipment, repairs and so on, dated March 23, 1966.

"Do you see that, sir? And again dated March 30, 1966.

"A Yes, sir.

"Q Both of those were Gulf documents prepared by Gulf; is that correct?

"A Yes, sir.

"Q And given to Beaman?

"A Yes, sir.

"Q What were those documents for?

"A The one on 3/23 was a change. When the original purchase order was issued in December they wanted an overhang on the front and one side.

"Q That is Gulf did?

"A Yes.

"Q Then what happened on March 23rd and March 30th, 1966; what did Gulf decide?

"A Gulf decided that they only wanted the lighting or the overhang on one side.

"Q Which side was that?

"A On the front.

"Q Who made that decision?

"A Front and one side. Let me see.

"Q Who made that decision, sir, for Gulf?

"A I don't know.

"Q Did Gulf ask the architect Mitchell to arrange to get the permit on its behalf to do this work?

"A Yes, sir."

Line 14.

"Q Did Gulf get a final invoice from Beaman Corporation dated June 17, 1966?

"A Yes, sir.

"Q That is part of Plaintiffs' Exhibit 7;is that correct?

"A Yes, sir.

"Q Is there any indication of the date that Gulf received this invoice, final invoice, dated June 17, 1966?

"A No, sir.

"Q After this invoice was received by Gulf, did Gulf arrange to dispatch you back to the premises?

"A Yes, sir.

"Q Were you dispatched tocheck whether this work had been done before payment would be approved?

"A Yes, sir.

"Q When was payment approved?

"A It looks like July the 27th.

"Q Is that July 27th?

"A Yes, sir.

"Q 1966?

"A 1966.

"Q You didn't get any invoice beyond June 17, 1966; is that correct, sir?

"A Not to my knowledge.

"Q Did you understand that the work had been completed by Beaman by June 17, 1966?

"A No."

Page 29, line 3.

"Q When you went down to the premises after you got the invoice dated June 17, 1966, at whose instance did you go there? Who instructed you to go there?

"A My supervisor.

"Q Who was Mr. Beschwitz?

"A Yes.

"Q What did he tell you to do?

"A What did he tell me to do?

"Q Yes. At that time.

"A Just to check and see that the overhang had been installed and was completed.

"Q Did you check?

"A Certainly.

"Q Did you go up on the roof at that time?

"A No, sir.

"Q Did you see from the ground level the condition of the roof or coping at that time?

"A No, sir.

"Q As far as you know was there anybody from Gulf Corporation that had been to the premises between the time you were there and April, 1966, when you turned over the permit and documents to Mr. James and the time when you made this inspection after the work had been allegedly completed?

"A Not to my knowledge.

"Q Did you know that at some time that Beaman had let out certain work, that they sublet out certain work to United Porcelain?

"A Yes, sir.

"Q When did you learn about that for the first time?

"A I don't know.

"Q Do you know that United Porcelain had been sublet work by Beaman in connection with the construction of other Gulf stations?

"A Yes.

"Q Was this before this job that Beaman had used United Porcelain?

"A Yes.

"Q And Gulf knew about that; is that correct?

"A Yes, sir.

"Q Did Gulf know before June 28, 1966, that Beaman had let, sublet out certain parts of this job to United Porcelain?

"A That I don't know.

"Q Did you know that there was an accident that had occurred at that gas station at some time involving two men that were injured?

"A I wasn't there.

"Q I understand, but did you learn at some time or other that there was an accident to two employees of United Porcelain?

"A Through hearsay, yes.

"Q When did you learn about it for the first time?

"A Probably two or three weeks after it happened.

"Q Did you speak to Mr. James about it at all?

"A No, sir."

THE COURT: Does that complete the depositions?

MR. AUSUBEL: Yes, that deposition.

THE COURT: What more do you have?

MR. AUSUBEL: Your Honor, I have a few more depositions to read.

THE COURT: Have you got a deposition that can be read in ten minutes? If not, we will just break now.

MR. AUSUBEL: Would your Honor permit us to break now?

THE COURT: Come back at five minutes to two. Is that agreeable with everybody? All right, ladies and gentlemen, come back at five minutes of two. We will break five minutes early.

(Luncheon recess.)

AFTERNOON SESSION

2:00 p.m.

(In open court, jury present.)

THE COURT: Have you agreed on the Tuesday proposition?

MR. BRILL: We haven't discussed it.

THE COURT: I will tell you members of the jury there is something I want you to consider during your next recess, which will be in an hour or so.

As I told you, I have another case pending on Monday and Tuesday. It occurs to me that maybe I will be able to get counsel in that case to finish off on Monday. If that should happen, counsel have indicated that they would be willing to be on call Monday afternoon for Tuesday morning and continue here on Tuesday. I want you to consider amongst yourselves whether that would unduly inconvenience any of you. If it does, I want to hear about it; if it doesn't, I will arrange the clerk to take your telephone numbers and we will adjourn to Wednesday, unless you hear from me Monday afternoon. You consider that during your next recess.

Proceed.

MR. AUSUBEL: If your Honor please, I at this time would like to read the deposition of Gerald

Sadowsky, that was the Gulf sales representative at the time of this accident. This was taken on July 14, 1970.

THE COURT: Try to confine yourself to what's essential.

MR. AUSUBEL: Yes. I went through this before. Beginning at page 4.

"Q What is your full name and home address, sir?

"A Gerald Sadowsky, 10 Rensselaer Drive, Spring Valley, New York."

Go to line 18.

"Q When did you work for the Gulf Oil Corporation?

"A The period?

"Q Yes.

"A August 1960 to July 1968.

"Q What was your title with Gulf Oil Corporation between August 1960 and July 1968?

"A Title was sales representative and real estate representative.

"Q Was this true during that entire period of almost eight years that you were with Gulf that you were both a sales representative and a real estate representative?

"A No. You are not both. I was the real estate representative for 1966 and most of 1967, I guess.

"Q When were you the sales representative?

"A 1967 until I finished, and prior to that, and after that.

"Q In other words, do I understand then you were a sales representative during the time from 1960 to 1966, and then --

"A 1960 to 1965, I guess; 1966 and 1967 real estate, and 1968 sales.

"Q Now, as a sales representative of Gulf Oil Corporation, when you worked for them, sir, what were your duties?

"A To solicit new business and cover the existing accounts we had.

"Q When you were the sales representative, did you have a specific territory that you worked out of?

"A Yes. I had a territory, but this changed from time to time, and any one period I really wouldn't know."

Go to line 14.

"Q During the time that you were the sales representative for Gulf Oil Corporation, did you have to call upon Gulf franchisees or dealers periodically and regularly?

"A Yes.

"Q Was it one of your duties to check and inspect the stations, the Gulf stations?

"A I don't quite follow you, 'inspect.'

"Q Do you have anything to do with checking or inspecting the stations as a Gulf sales representative? I am talking now about Gulf stations.

"A Well, the Gulf Oil Corporation has an operating department which is engineers and so on. They would be involved with the physical plant.

"I would become involved only when somebody would inform me possibly that a roof is leaking, sidewalk was breaking up, something like that. At that time, if it is called to my attention, I would report it.

"Q Now, as a Gulf Oil Company sales representative, did you have any independent responsibilities or duties to make any inspections other than when it was called to your attention by the Gulf station operator?

"A No, I didn't make independent inspections.

"Q Were you ever instructed to make such inspections by Gulf?

"A I never recall that.

"Q Did you have any duties to check as to what the condition of the service station was when you were a sales representative?

"A Would I be asked to check on the condition, you say?

"Q Yes, the physical condition of the station.

"A Yes.

"Q What were your duties in connection --

"A In terms mainly --

"Q Checking on the physical station?

"A Yes, mainly as it would possibly need a paint job or refurbishing the rest rooms, of that nature, they would ask me to take a look at it, yes.

"Q Did you have any other duties with respect to checking the physical condition of a Gulf station?

"A No, I don't recall.

"Q Did you have any duties with respect to checking on any physical defects that might exist in a Gulf station as a sales representative for Gulf?

"A Gulf asked me to check or the dealer brought it to my attention?

"Q Either or both, or apart from them.

"A Yes. If it was brought to my attention that something should be looked into further by someone besides myself, I would report it, I would write it up possibly, or verbally report it.

"Maybe a sidewalk was starting to crack or something else needed attention.

"Q But this was only if it was called to

your attention, do I understand that correctly?

"A Yes. I wouldn't -- unless I found it myself. If I see a hole, I would report I found a hole.

"Q I see.

"A (Continuing) But I wouldn't go out of my way looking for physical -- no, I wouldn't.

"Q Would anybody from the Gulf organization, to your knowledge, other than a sales representative make periodic visits to the Gulf service stations?

"A I really don't know. Gulf Oil is a big corporation and it has different departments, and it has engineers."

Page 13, line 23.

"Q How often would you call upon the Gulf Service Stations within your territory?

"A How often?

"Q Yes, sir.

"A I would say at least once a month and maybe semi-monthly.

"Q Was there any other person who regularly visited the Gulf Service Stations besides the sales representative?

"A Well the gasoline delivery driver, truck driver.

"Q Other than the two of you.

"A Salesman, delivery driver, and maintenance when it was required.

"Q And the maintenance was from the operating department of Gulf?

"A Yes, sir.

"Q Would they go there periodically to the service station?

"A Usually when they are called.

"Q That is when their attention --

"A Was drawn to some condition.

"Q Who would check on the Gulf pumps and the signs and the emblems of the Gulf Service Station?

"A Sales representatives.

"Q That was one of his jobs --

"A Check on the condition of the pump?

"Q Yes.

"A Yes, sales representative.

"Q Who would check on the condition of cleanliness of the Gulf Service Station?

"A Sales representative, except when the manager rode with him they would both see it.

"Q Were there some procedures whereby the sales representative would go over with the franchisee

certain things that were supposed to be done with respect to the maintenance of the franchise, the Gulf franchise?

"A Say that again.

"Q Was there a procedure whereby the franchise was informed by the sales representative of the various responsibilities of a franchisee in Gulf?

"A Yes.

"Q In connection with the maintenance of the service station?

"A Yes.

"Q What was the procedure?

"A The procedure would usually be at the time the dealer would sign the lease.

"Q Yes?

"A He would be told certain procedures, how to maintain the compressor, the lift, and certain things, periodic checking and bleeding maybe of a compressor, oiling of a piece of equipment.

"Q What about the physical condition of the premises which was the subject of the franchise, the building itself?

"A No, the building wasn't concerned unless it suddenly started to leak a roof or something happened, but it wouldn't be a matter of custom or procedure to have

him do anything to the building, only to the equipment.

"Q Was there any discussion had with respect to the maintenance of the building proper between the sales representative of Gulf and the franchisee?

"A The usual subject that would come up would usually be painting when required or when the dealer felt -- he thought he should have a paint job. That would very often come up, and paint jobs might not be done but once in three or four years, and maybe really needed it sooner, but that would be --

"Q Apart from a paint job, let's assume that there would be a physical defect to the condition of the building proper, was there some discussion as to who would be responsible for repairing such a defect or taking care of such a defect?

"A No, this would not be done in anticipation of anything. If and when something would develop, as I said whether itwas a crack in the sidewalk caused by the weather or a leaking in the roof, if and when it occurred, then the dealer would raise that subject with the salesman.

"Q I am asking now whether at the very beginning of the relationship when the lease was entered into between Gulf and the franchisee, was the sales representative

required to discuss with the franchisee about who had responsibility of making repairs to the physical condition of the building?

"A Yes. There is a list of items. For instance, he would have to replace the bulbs as they wore out.

"Q What about if there was a crack in the wall or a defective coping or defective roof?

"A I said, the one who would usually notice this first would be the fellow in the station.

"Q I understand; but quite apart from who would notice it first, was there some procedure or practice whereby the sales representative was instructed by Gulf to discuss with the franchisee at the very beginning of the relationship --

"A No.

"Q -- as to who had the duty?

"A No.

"Q Was there any procedure whereby the Gulf Oil Corporation would make any suggestion to the franchisee as to the frequency, if any, that the franchisee should inspect the physical condition of the building?

"A No, I don't recall that.

"Q Do I understand then correctly that as a sales representative you were never told by Gulf to discuss with the franchisee how often the building was to be inspected or maintained, is that correct, sir?

"A No, that's right, I don't recall that.

"Q Was there any practice or procedure, to your knowledge, when you were a sales representative, whereby you would discuss with your customers, that is, Gulf customers, the frequency with which the building should be inspected or maintained for any possible defects?

"A No, I don't recall that.

"Q Did you ever discuss that with any of your customers how often they should inspect or maintain the building?

"A Inspect what?

"Q Inspect the roof, the coping or anything concerning the structural condition of the building.

"A No, I never requested them to inspect this, but when something occurred that they thought should be brought to my attention, they would immediately bring it to my attention.

"Q But assuming, quite apart --

"A If you are saying preventive maintenance --

"Q That's the point, was there any procedure whereby Gulf had a preventive maintenance program so

that there would be some discussion had between Gulf and the franchisee as to the frequency with which inspections or maintenance should be had of the structure of the building?

"A No. It didn't concern me, I don't recall it as a salesman, but we did have an operating department.

"Q I understand. Do you know of your own knowledge whether there was any preventive maintenance program--

"A I don't know.

"Q -- by the operating department?

"A This I don't know.

"Q Did you ever see any written memorandum or document of Gulf Oil Corporation dealing with the subject of preventive maintenance, to use your language?

"A With me? Not to me. If it was done with the operating people, it would never come to my attention.

"Q During the eight years that you were with Gulf, do you of your own knowledge know of any program whatsoever whereby Gulf would instruct or suggest or advise franchisees as to any inspections that should be made or the frequency of any inspections which should be made with respect to the structural condition of the premises?

"A I don't recall.

"Q You don't recall any such program?

"A No.

"Q On any occasion when you dealt with any customer that was within your territory while you were a sales representative of Gulf, do you have any recollection now of ever discussing with any Gulf franchisee about the subject or matter of how often, if at all, any inspection should be made of the physical condition of the buildings that made up the service station?

"A I don't recall any of those things, I am talking for myself now.

"Q I understand. Do I understand correctly that you don't recall any instance where you discussed this matter --

"A That's right, I didn't discuss it.

"Q All right. Were you ever instructed by Gulf to discuss it with the customer?

"A No, I don't believe so."

Page 25, line 10.

"Q Apart from that, apart from instances when a dealer might have called it in or you yourself noticed the defect, as a representative of the company were

you ever asked either as a real estate representative or a sales representative to go up on a building and check on the physical condition?

"A I have never been on the roof of a building."

Go to page 28, line 25.

"Q When a decision was made to modernize a station, and by the way that was not an unknown thing?

"A Modernize?

"Q Yes, put in a new overhang.

"A Yes, there was a period where quite a bit of that was being done.

"Q When was that?

"A Several years ago.

"Q About when, could you say?

"A I really don't know about when. Of course, it is being done right up to date.

"Q I understand.

"A (Continuing.) But there was a period, I don't know whether five or six years ago or something like that where they were modernizing a number of stations.

"Q When you say 'modernizing,' you mean--"

THE COURT: What was the date of this deposition?

MR. AUSUBEL: Your Honor, this deposition was

July 14, 1970.

THE COURT: So five years ago means '65.

MR. AUSUBEL: Yes, sir.

"Q When you say 'modernizing,' you mean putting in a rew overhang, new lights, new pumps?

"A Not necessarily. You can make a complete overhaul or you would put new pumps, new island lights, you might simply paint it or put porcelain on it; you might put an overhang, maybe not put an overhang. It would depend on the individual station.

"Q Would the initial request and suggestion be conveyed to Gulf through the sales representative?

"A Sometimes, but not always. Many of them I found out about afterwards was done simply by the district manager.

"Q Directly?

"A Directly.

"Q By the way, when you went through your training as a sales representative in that school at Greenwich, were you given any instructions about making out any reports concerning maintenance and inspection of service stations?

"A I believe there were some instructions on who should be notified, yes, I think so. It was ten years ago

"Q I understand. What were the instructions given to you at that time when you went to school with respect to making out reports?

"A I really couldn't break it down, but I believe that was covered that when the occasion arose what you are to do and how to handle the situation.

"Q Were you instructed at that time that reports were supposed to be made out whenever there were any inspections or maintenance at a Gulf Service Station?

"A Yes, you would report it to the operating, either directly or through your office."

Now go to line 22.

"Q Now, we have been advised, you understand, by the attorneys for Gulf that you were the sales representative for a service station, a Gulf Service Station located at 2153 Eighth Avenue in Manhattan.

"A Yes.

"Q In 1965 and 1966, they tell us that, according to the records that you were --

"A If they tell you. I wouldn't know the dates, but if they tell you, they must know.

"Q All right. Do you recall that you were a sales representative for a service station located at

Eighth Avenue and 116th Street, Manhattan?

"A Yes.

"Q Do you recall that there was a gentleman by the name of James?

"A Yes.

"Q Who ran that station?

"A Yes.

"Q Do you know how long you were the sales representative, over what number of years were you the sales representative of that particular station?

"A I think I must have been a salesman there in 1967, maybe part of 1968, but I don't think it was 1966.

"Q They tell us the records show that you were in 1965 and 1966 there as well.

"A As a salesman?

"Q Sales representative, yes.

"A Whatever they say. I don't recall the specific dates. There was a couple of years.

"Q During the time that you were a sales representative for this service station located at 2153 Eighth Avenue near 116th Street in Manhattan, did you know Mr. James, Joseph James?

"A Yes.

"Q How often did you call upon that service

station during the time that you were a sales representative?

"A At least once a month. Quite possibly I went twice a month. I could even see him three times if the occasion arose.

"Q But there was a regular procedure whereby you called upon Mr. James, is that correct, sir?

"A Right.

"Q Now, during the time that you were a sales representative, apparently there was some construction work done on the service station, do you recall that, sir?

"A Well, not while I was -- I think it was completed before I was the salesman.

"Q According to the information that Gulf's attorneys have given us, you were the sales --

"A I was a salesman at the time the work was going on?

"Q Yes.

"A I don't recall.

"Q Do you recall at some point that there was construction work done at that service station?

"A Right.

"Q All right --

"A It may have been done right prior to me, they

modernized it.

"Q Do you recall how it came about that that service station was modernized? Do you recall whether that --

"A No. I had nothing whatsoever to do with instigating it or had any recommendations to make.

"Q Sir?

"A I had no recommendations on that one at all.

"Q None at all?

"A For me, I had nothing to do with promoting that deal.

"Q Before that job was begun, do you know one way or the other whether there was something defective about the roof or the coping of the roof of that building?

"A No.

"Q Did you ever go up there to check?

"A No.

"Q To determine the physical condition of the roof?

"A Was I on that roof?

"Q Yes.

"A No.

"Q Roof or coping of the roof at any time before

the work was undertaken.

"A I was never on that roof.

"Q Were you ever asked to make a check of the condition of that roof?

"A No.

"Q Do you have any recollection now of what conversations, if any, you may have had with either Gulf or Mr.James or anybody else with respect to that roof on that service station before the work was undertaken?

"A No, sir.

"Q Do you know whether there was any procedure in effect during the time that you were the sales representative for the service station at 2153 Eighth Avenue at 116th Street in Manhattan whereby there would be any inspection made of the roof or coping of the Building, and I am talking about that particular building, before any contract was let out or work undertaken in connection with the roof or coping?

"A I know nothing about that.

"Q You had a number of remodeling modernizing jobs in Gulf Service Stations that you had had personal contact with, did you not?

"A Yes.

"Q While you were a sales representative?

"A Yes.

"Q Now, this kind of work when an overhang was put in on the building, this involved a roof and lighting near the roof, did it not?

"A Yes."

Now go to 38, line 7.

"Q During the time that you were the sales representative for this service station at 2153 Eighth Avenue near 116th Street, Manhattan, did you know what the condition of the roof or coping was on that building?

"A While I was a salesman?

"Q Yes.

"A No, sir, I don't know that. I don't recall everygetting any complaints.

"Q I am just asking you if you knew what the condition was.

"A No, never came up.

"Q Did you ever go up on that roof at any time?

"A No."

There is a continuation of the answer at page 39, line 4.

"A (Continuing) I have never been on that roof or any other roof.

"Q Did you know that there was an accident at that service station?

"A I heard about it.

"Q When did you hear about it for the first time?

"A For the first time, I don't know exactly when, but it was a way after it must have happened.

"Q You don't know exactly what day or month it was?

"A No.

"Q Was it some time ago?

"A From now you mean some time ago?

"Q Yes.

"A Oh, yes.

"Q Now, at the time when you first heard about it, were you a sales representative for Gulf?

"A Yes, I was a sales representative.

"Q Were you the sales representative for Mr. James during that time?

"A Yes, must have been.

"Q Did you ever discuss this accident with Mr. James?

"A Yes. I asked him what happened.

"Q What did he tell you?

"A That somebody had gotten hurt on the job.

"Q That's all he told you?

"A Someone got hurt, one of the workmen, I believe, got hurt.

"Q Did he tell you anything about whether the roof had collapsed or the coping had collapsed?

"A No.

"Q Did he tell you where the man had gotten hurt?

"A No. I think he had said concerning the roof, but I don't know what happened."

Now, page--

MR. BRILL: If your Honor please, I would move to strike that answer. It is not competent or relevant.

THE COURT: If someone had objected on the ground of relevance I would have sustained it long since. I don't see what this has to do with the case, what he heard from other people. What has this got to do with the case?

MR. AUSUBEL: No, this is a conversation with Mr. James.

THE COURT: What does it prove?

MR. AUSUBEL: Well, conversation with Mr. James constitutes --

THE COURT: I can have a conversation with you

about a movie I saw last weekend, what does it prove?

MR. AUSUBEL: Your Honor, it may have probative value when, as and if--

THE COURT: Enlighten me as to what the area of the probative value will be.

MR. AUSUBEL: Your Honor, I offer this as some admission by Mr. James, who is a president--

THE COURT: Concerning what? That there was an accident? Everybody knows there was an accident.

MR. AUSUBEL: Well, more than that, as to the locus of the accident, but--

THE COURT: Everybody knows where the accident was. What do you want, admissions of that? Sustained on the grounds it has no relevance or anything to do with the case.

Don't just put in stuff for the sake of reading. If you want to prove something, prove it. I am waiting for objections.

MR. AUSUBEL: Page 44, line 10.

"Q On Plaintiffs' Exhibit 6 on page 2 there is a check list of certain items, is that correct?

"A I don't know.

"Q Here, take a look at it.

"A Yes.

"Q It says Gulf--

"A Check list, yes.

"Q Is that correct?

"A Yes.

"Q Were these the things that you were supposed to discuss with the customers?

"A That's correct.

"Q What does this mean here on page 2 of Exhibit 6, 'Proper Records. Dealer management and record system, Gulflex file, in businesslike record-keeping.' "

MR. BRILL: If your Honor please, I object again. I don't see any relevance or materiality on this question.

THE COURT: What are you trying to establish?

MR. AUSUBEL: Well, this purports to define the relationship between Gulf and the franchisee, as to what responsibilities each has in connection with the maintenance of the premises.

THE COURT: I will allow it for that purpose.

"A Dealer management record system is that system which the accountant would devise for the dealer to keep up, the Gulflex file is every time you do a grease job, they suggest keep the name and address and

develop a list of your customers.

Businesslike record-keeping, keeping the monies he paid out and so on. Bookkeeping system, that's all it is.

"Q Now, then there is on the same page beneath that is the heading, 'Maintenance Responsibility.'

"A Right.

"Q 'Discuss the obligations of both parties in this respect, see statement entitled 'Lessee-Dealer Responsibilities for service station maintenance that can be read, discussed and initialed by both parties if desirable.'

Do you see that, sir?

"A Yes.

"Q What did you understand that to mean?

"A Let me look at it."

MR. BRILL: If the Court please, I object now, what it means to the witness. I also object on the ground it is immaterial and no relationship to this action.

THE COURT: Both objections are overruled because this is a Gulf employee and what it means to him may have some relevance. Overruled.

"A Let me look at it.

"Q Go ahead.

"A 'Maintenance Responsibility.' He was to keep the driveway free and unobstructed. You asked me what it means. As far as I know, it didn't refer to the structure."

MR. BRILL: I withdraw the objection, your Honor. I missed that part.

THE COURT: It seems rather obvious it didn't refer to the structure. He is talking about driveways.

"Q As far as you know, what did it mean in dealing with the customers?

"A That he was to see that the lift was properly lubricated, see if it needs lubrication, there was a grease fitting. See that the air compressor was bled of any accumulated water, to see that the different equipment was in operating condition, and if not, to notify us.

"Q Now, did you understand by this check list, Exhibit 6 in evidence, that when dealing with your customers in your territory that you were to discuss with them the physical condition of the building? Under the heading of 'Maintenance Responsibility.'

"A I don't recall discussing the physical -- by that you mean roof, walls?

"Q That's right.

"A No.

"Q Coping?

"A No.

"Q You wouldn't discuss it?

"A No. We wouldn't lease it."

Go to page 49, line 2.

THE COURT: Excuse me, what was that?

MR. AUSUBEL: Page 49, line 2.

"Q I am going to direct your attention to this first full paragraph which reads as follows:

'For the purpose of clarification and avoiding misunderstanding the undersigned dealer (lessee) and Gulf (lessor) have set out in detail the following maintenance responsibilities applicable to their service station lease:'

'And then it has another paragraph, 'Driveways, structural defects. Until further notice to the contrary, and in order to assist the dealer in the upkeep of his station leased from Gulf, Gulf will repair the surface of the driveways and structural defects in the building, not including glass.'

"A Yes.

"Q 'Dealer will keep Gulf's buildings free of unauthorized sign attachments and will not drill holes in

the porcelain enamel.'

"Did you see that, sir?

"A Yes, I heard you.

"Q Was that in the standard agreement that was available to you when you were a sales representative?

"A Sounds somewhat like it.

"Q When you were the sales representative for the various service stations that were within your Gulf Service Stations that were within your jurisdiction, did you ever discuss with your customers such as Mr. James about what Gulf's duties were as well as the dealer's duties in connection with structural defects?

"A No, I can't answer it yes, I just don't recall that discussion with him.

"Q Do you have any recall now of ever discussing that particular subject which I have just read to you from Plaintiffs' Exhibit 5?

"A The subject I recall discussing with Mr. James is the business of broken glass which was quite a problem up there. This we would discuss, and every time it broke, Mr. James would replace the glass. He wasn't too happy,but he did it.

"Other than that, that was our main subject,

always glass.

"Q When you spoke with Mr. James, did you know that there were certain incidents that occurred in his service station that resulted in broken glass?

"A I knew what--"

MR. BRILL: If your Honor please, I don't see that that is material.

THE COURT: What was the question?

What has broken glass to do with this case?

MR. AUSUBEL: The next question may have.

THE COURT: Why? Why is it relevant?

MR. AUSUBEL: I just mean the single question and answer beginning at 51, line 7, your Honor.

THE COURT: What's that got to do with it? I don't see what you are proving.

MR. AUSUBEL: I have no further material from this deposition.

THE COURT: Anybody want to add anything?

MR. BRILL: Yes.

THE COURT: You want to add something?

MR. BRILL: Yes. Will your Honor just give me a moment.

THE COURT: Yes.

MR. BRILL: I would like to go back, your

Honor, to page 36 if I may, just to get the context, starting at line 16.

"Q Now, this kind of work when an overhang was put in on the building, this involved a roof and lighting near the roof, did it not?

"A Yes.

"Q Was Gulf the one who would pay for the repairs or modernizing of the Gulf Service Station?

"A I really wouldn't know, I couldn't answer you that.

"Q Who would let out the contracts for the doing of the work?

"A Even that I wouldn't know."

I am skipping now, line 5.

"Q Do you think it was the service station itself?"

MR. FUREY: Objection.

MR. BRILL: Well, he said he didn't know anyway.

MR. FUREY: Then why read it?

MR. BRILL: Down to line 20, page 37.

"Q Did you ever talk to Mr. James about that service station, about modernizing the service station?

"A No, sir, I never discussed with him modernizing.

"Q Or repairing it or putting in a prefabricated overhang?

"A I never discussed that with Mr. James."

Now turning to page 53, your Honor. Page 53, line 16, this question:

"Q I understand. Now I am asking you whether you have ever discussed with Mr. James the matter of structural defects in the building.

"A I don't think the question ever came up."

THE COURT: Anything else, gentlemen?

Any more depositions?

MR. AUSUBEL: Yes, your Honor. The only good part about it is that they get shorter.

I want your Honor to understand this was undertaken over a period of many, many months.

THE COURT: Yes, I can understand that.

MR. AUSUBEL: I only have two of this one.

This is a deposition of the Beaman Corporation by Mr. Spencer.

MR. DUBROWSKI: I am going to object to any testimony of the Beaman Corporation. The plaintiff didn't sue my client. I am a third-party defendant here. Though I think there is nothing harmful in the deposition, certainly, I still don't think it should be

read by the plaintiff. It is not part of his case.

THE COURT: Were all parties present at this deposition?

MR. DUBROWSKI: Yes, sir.

THE COURT: Then anybody that wants to can read it.

MR. AUSUBEL: This is a deposition of Beaman Corporation by Howard G. Spencer, taken on June 19, 1970.

"Q What is your full name?"

THE COURT: By whom?

MR. AUSUBEL: This is by Mr. Ausubel. Page 4.

"A H.G. Spencer.

"Q Where do you live, sir?

"A 101 Gorsuch Road, Lutherville, Maryland."

Line 10.

"Q By whom are you employed, sir?

"A Beaman Corporation.

"Q Where is their place of business, sir?

"A Greensboro, North Carolina.

"Q Do you know the address in Greensboro?

"A 1046 West Side Drive.

"Q Beaman Corporation is engaged in what business, sir?

"A Prefabricated buildings and modernizing,

primarily service stations for all of the oil companies.

"Q Does your work entail any structural changes to the buildings that are being modernized or for which prefabricated material is manufactured or assembled?

"A I don't understand what you mean. Structural changes from what?

"Q In other words, if you are hired to assemble or manufacture prefabricated material or to modernize a gas station or oil station, does your work involve the physical change of the building proper, such as changing a roof or changing copings or doing things of that nature?

"A Primarily, no.

"Q Do I understand then that your function is essentially for decorative purposes?

"A Correct.

"Q How long has Beaman been in this business?

"A Approximately 20, 21 years.

"Q Do you work out of the North Carolina office?

"A I work out of Baltimore. I manage two offices for Beaman.

"Q What is your title with the company, sir?

"A I am manager and vice-president on one company and manage another.

"Q That is, you are manager of the Beaman Corporation?

"A Of Maryland."

Line 24.

"Q And you are also vice-president of the Beaman Corporation?

"A And manager of Beaman Corporation of Virginia.

"Q As manager, what are your duties?

"A I have overall erection responsibility and sales responsibility in my territory.

"Q Does your territory include the Eastern Seaboard, sir?

"A A part of the Eastern Seaboard.

"Q What part?

"A Delaware, Maryland, Pennsylvania, Virginia, part of the West Virginia and part of the New Jersey territory.

"Q When you do have some jobs in New York are you familiar with Beaman's work in the New York area?

"A Yes, I am.

"Q Would you say that is part of your territory --

"A That is not part of my territory.

"Q But you are familiar with the work that is done here; is that correct, sir?

"A Yes.

"Q Would you say that your jobs are fairly uniform, those that are under your jurisdiction?

"A Yes, they are.

"Q Would that be true of any jobs that are performed in New York, sir?

"A Yes.

"Q How long have you been with the Beaman Corporation?

"A Sixteen and a half years.

"Q During this time have you had the same managerial responsibilities?

"A Yes, sir.

"Q How long have you been a vice-president of the company?

"A Approximately twelve years.

"Q Sir, is one of the gas and oil companies that Beaman has dealt with over the years the Gulf Oil Corporation?

"A Yes, sir, it is.

"Q Prior to 1966 did you have some arrangements with Gulf Oil Corporation in connection with doing certain

work for them?

"A Yes.

"Q What kind of arrangements did you have?

"A We submit to Gulf a blanket bid to do work on any number of service stations. We submit a blanket price to them. They in turn submit to us what they call and what we call a blanket order. They tell us a location and the extent of the work that needs tobe done, and this constitutes their purchase order for our work.

"Q What was the arrangement that was in effect in 1965 and 1966 between Beaman and Gulf? Specifically, what was submitted by Beaman and in turn what did Gulf submit to you in connection with work to be done?

"A Specifically, what do you mean?

"Q Was there a regular procedure that you had which was in effect prior to 1966?"

MR. DUBROWSKI: You just asked that.

MR. AUSUBEL: I will go to line 19.

"Q What do you mean by 'blanket bid' and what do you mean by 'blanket policy'?

"A A blanket bid would be a bid to cover a large number of jobs. Our price would be a unit price.

"We did the pricing for Gulf Oil. We submitted to them an invoice after our engineering work

was done and sent the price to them.

"We did not bid on each job individually. Only on a unit basis did we bid.

"Q Was this a uniform practice that you had with Gulf prior to 1966?

"A I would have to say yes. I am not sure of it.

"Q But as far as you know, it was -

"A I don't know how far back this arrangement went.

"Q Had it been in effect, this uniform practice with Gulf, for some years prior to 1965? "

MR. AUSUBEL: I should indicate the witness indicated his answer was, "I don't know," but subsequently made a correction to the transcript, which reads as follows: "The practice of handling contracts on blanket basis began in the year 1964."

Line 19.

"Q In connection with this uniform practice which you had with Gulf, assuming Gulf wanted work done on a given service station, what would be the initial contact that Gulf would have with Beaman?

"A On any --

"Q On a given job.

"A They would send us a release to do this work.

"Q In writing?

"A Or a purchase order, yes.

"Q When you say 'a release or purchase order,' what does that mean?

"A The authority to do the work.

"Q Is 'release' the same as 'purchase order'?

"A In my terminology, yes.

"Q In connection with each one of these transactions that took place between Gulf and Beaman up to June 28, 1966, was the contact made with Beaman by Gulf Oil Corporation itself?

"A Gulf would notify us for a specific job, if this is what you mean.

"Q You wouldn't get any communication, as I understand it, from the franchisee or architect, would you?

"A No, sir.

"Q It would be Gulf who would request that the work be done and it would be Gulf who would pay for the work; is that correct?

"A Yes, sir.

"Q In connection with these various projects was there a procedure whereby Gulf would give you certain instructions as to what work they wanted done and how it

should be done?

"A No, sir, just the extent of the work to be done. Front and one side or front and two sides.

"This is the instructions we received.

"Q Do I understand, then, that once you got this purchase order or release you would then assemble or manufacture the prefabricated material; is that correct?

"A That is correct.

"Q Specifically, what did you manufacture and assemble? What kind of materials did you deal with?

"A Aluminum structural members and architectural porcelain decorative members, so to speak.

"Q What kind of aluminum structural members did you manufacture and assemble, sir?

"A The necessary brackets to support the facing that was being added to the building.

"Q Do you know whether Gulf Oil Corporation during the years 1965 and 1966 dealt with any other manufacturer of this type of decorative material besides you?

"A I am sure they did.

"Q Getting down to a specific job located at 2153 Eighth Avenue in Manhattan, sir, was Beaman

Corporation hired by Gulf Corporation to do certain work in connection with that service station?

"A This is a job at 301 West 116th Street?

"Q Which is also known as 2153 Eighth Avenue; is that correct, sir?

"A Yes, sir, we were.

"Q When was the first communication that you got in connection with that job, sir?

"A 12th of December, 1965 we received a Gulf purchase order.

"Q Do you have with you your file in connection with this transaction, sir?

"A Yes, I do. "

MR. AUSUBEL: There were a group of documents--

MR. DUBROWSKI: They are already in evidence.

MR. AUSUBEL: Some.

MR. DUBROWSKI: I thought they all were.

MR. AUSUBEL: There were one or two which were part of then Exhibit 6. I don't mean to over-burden the Court with papers, but I would offer in evidence such of then marked Plaintiffs' Exhibit 6 for identification, which are not now in evidence, as Plaintiffs' Exhibit 7, if it is agreeable with my adversaries and the Court.

THE COURT: Can you identify them?

MR. AUSUBEL : I say, I am not going to duplicate any documents. Those which appear in this Crawford Exhibit, which are already in evidence, I am not offering. I am only offering such documents as are not already marked in evidence.

Your Honor, we have agreed that two pages of the proffered exhibit are new, and I offer those two pages, which were then referred to in the deposition as Exhibit 6 for identification.

THE COURT: And you are now offering it ?

MR. AUSUBEL: As Plaintiffs' Exhibit 8 in evidence.

THE COURT: We'll get the clerk to mark them when he comes back, but they are received in evidence.

** (Plaintiffs' Exhibits 7 and 8 received in evidence.

MR. DUBROWSKI: No objection, your Honor.

THE COURT: I didn't mean to preclude you.

MR. FUREY: No objection, your Honor.

MR.BRILL : I don't know what it is.

MR. DUBROWSKI: Here, do you want to look at it? (Handing.)

MR. AUSUBEL: Line 24, on page 12.

"Q In connection with this particular job at 2153 Eighth Avenue, which is described in Plaintiffs'

Exhibit 8 in evidence, did this job entail any modification to the roof proper or the coping of the roof?

"A No, sir, not that I know of.

"Q Were you ever requested by Gulf Oil Corporation or anybody else to make any inspections of the roof or coping before you undertook the work?

"A Not to my knowledge.

"Q In connection with this job at 2153 Eighth Avenue, essentially what were you requested to do by Gulf Oil Corporation?

"A Furnish and install an overhang on the front and two sides of the subject location.

"Q Did this require any distortion at all of then physically removing any part of the building proper, the structure, to your knowledge?

"A We would not know that it would.

"Q Were you ever requested by Gulf Oil or anybody else to remove--

"A To remove--

"Q --any part of the building proper?

"A No, not to my knowledge.

"Q Do I understand that essentially you were supposed to put out some kind of overhang from the roof and a new facing?

"A Yes, sir.

"Q How would one put the overhang out from the roof?

"A It is attached to the face of the masonry wall, brackets are attached to the face of the masonry wall.

"Q Is this affixed to the roof and coping of the building?

"A Not basically, no. It is attached to the wall, the building wall itself. Not attached to the roof at all. Probably not attached to the coping at all.

"Q Would one, in order to put this on the building proper, have to work -- or could one work from the building to put on the overhang?

"A Part of it could be done from the building.

"Q From the roof of the building?

"A Part of it would have to be done from the roof of the building.

"Q Were you requested before you began this job to make any inspections of the roof of the building?

"A No, sir.

"Q Were you told that there were any special precautions to be exercised in connection with the use of the roof of the building before or during the progress of this job?

"A Not to my knowledge. We are cautioned about, 'Don't damage the roof of the building so it won't leak,' but other than this --

"Q Were you told by Gulf or anybody else before you began this job that there was anything unstable about the roof or the coping?

"A Not to my knowledge.

"Q Were you told that you were not to use the roof or the coping at all in connection with this installation of the overhang or the decorative -- the new decorative wall?

"A Not to my knowledge.

"Q Do I understand that Plaintiffs' Exhibit 7 in evidence constitutes all of the documents that you received or submitted to the Gulf Oil Corporation in connection with this job?

"A Yes."

MR. DUBROWSKI: May I interrupt, your Honor, the exhibit is not just 7 but 7 and 8, it is a combined exhibit, so next time counsel, will you refer to both?

MR. AUSUBEL: Oh, I am sorry, yes, 7 and 8.

THE COURT: 7 and 8, right.

MR. DUBROWSKI: Thank you.

MR. AUSUBEL: An up to now when I have

referred to Exhibit 7, I intended to mean 7 and 8.

"Q The initial request that you got was a document dated December 9, 1965, Order No. ER 65064; is that correct, sir?

"A Yes, sir.

"Q Is that the sum total of the request and the instructions that you received from Gulf Oil Corporation in connection with this job?

"A We received some change orders, but this is a -- this is the initial request and the basic request, yes, sir.

"Q What was the initial request as is described there?

"A To convert the B-50 type 3 bay brick building to a B-60 type type on front and install an economy overhang on two sides.

"Q What does that mean?

"A That we would install on the front of the building -- the overhang on the front and two sides of the building.

"Q Where is the top of this overhang with respect to the roof proper?

"A The top of the overhang would be approximately four inches above the top of the parapet of the building.

"Q When you say 'parapet,' what do you mean by that?

"A That is the highest point on the building.

"Q So that in order to put that overhang on, you could work from the roof proper; is that correct, sir?

"A Yes, sir, this is possible.

"Q You were reading about what was involved in this job. Go ahead.

"A 'Each of the above will include furnishing and installing standard Westinghouse perimetal lighting similar to that shown on Gulf's drawing ER-121- Revision 1.'

"Q Was there submitted to you certain drawings by Gulf in connection with the proposed decorative changes?

"A Yes.

"Q Go ahead.

"A '-- and attaching two sets of Gulf building letters and dealer name bar furnished by Gulf.'

"Q What do you mean by 'letters and dealer name bar'?

"A These are the word 'Gulf' and the name of the dealer is attached physically to the face of the building.

"Q Then you have down something about the cost which would be in accordance with your blanket purchase order?

"A 'Cost of the above will be based on standard prices and conditions covered by a blanket purchase order No. ER-49951-R.'

"Q What modifications were thereafter made by Gulf to this purchase order of December 6, 1965?

"A This was a modification to include porcelain enamel on the front and two sides, front and one side, and to adjust the price of the contract due to no existing porcelain enamel.

"Q Was there any other modification made?

"A No, sir.

"Q In terms of once you got this order from the Gulf Oil Corporation, in terms of your general practice before this job of December 9, 1965, did Beaman ever make arrangements to make an inspection of the gas station that would be modernized or renovated?

"A Not inspection. The dimensions of the building would have to be predetermined. In other words, we would have to measure the length and width of the building.

"Q What about to determine whether the structure

was physically safe to work on, was any inspection made by Beaman? What was done about that? Whom did you rely upon for that purpose?

"A No, sir, no inspection was made. The very fact of whether the building is safe or not is not visible due to the existing porcelain enamel on the job normally. We make no effort to determine whether a building is safe or not.

"Q Whom did you rely on for that purpose?

"A I would have to say that when Gulf submits an order to us that it is our assumption that this is a safe building to work on.

"Q So you rely upon Gulf to make the prior inspection and to tell you if there is anything special that you have to worry about in connection with the structure; is that correct, sir?

"A I think this would be a reasonable expectation, yes, sir.

"Q In connection with this very job at 2153 Eighth Avenue, after you got the purchase order of December 9, 1965, what did Beaman do?

"A We manufactured the material and shipped it to the job site.

"Q The material you manufactured was what?

"A The necessary aluminum brackets and the porcelain enamel. The light fixtures we bought and had shipped to the job site."

MR. AUSUBEL: I should indicate, your Honor, there was a correction made to the transcript, and I will read the correction. The correction made by the witness is as follows:

"The necessary--"

Maybe I ought to read the question again.

"Q The material you manufactured was what?"

The corrected answer is:

"A The necessary aluminum brackets, The porcelain enamel and light fixtures, we bought and shipped to the job site."

THE COURT: For your information, as to these corrections you talk about, the process here is that the witness is questioned, exactly as he is now, before a court reporter; then when it's all transcribed he has to sign it. Naturally, in signing it, he reads it to make sure that he spoke correctly and that his answers were taken down correctly. If he has a question of either one, he can change it. In other words, the original type is left and he corrects it.

MR. AUSUBEL: Line 25.

"Q Do you know about when it was that you had sent it to the job site?

"A Approximately June 17th.

"Q Before June 17, 1966 did you have any communication with anybody from Gulf Oil Corporation after the initial purchase order of December 9, 1965?

"A Not to my knowledge. They would advise us when they wanted the job shipped. This type of communication only.

"Q The third document in this list of documents which has been marked as Plaintiffs' Exhibits 7 and 8 is a document of Gulf Oil Corporation which is -- it has two dates, one is April 4th and the other one is March 28, 1966.

"Is that the document which you received wherein you received the authorization from Gulf that it was now satisfactory to fabricate and ship the material which was ordered?

"A Yes, sir.

"Q Did you send any representative to the job site before you shipped the material on or about June 17, 1966?

"A Not of my own knowledge. I do not know.

"Q Does your file reflect any representative of

Beaman having gone to the job site before June 17, 1966 when you sent your material to the job site, sir?

"A We would have sent a person to the job site to obtain the dimensions I mentioned earlier, the length and the width of the building. This is all.

"Q At that time, when you would send a representative to determine only the length and width of the building, you would have available to you the plans and specifications prepared by Gulf and sent to you; is that correct, sir?

"A These would have been in our home office in Greensboro, North Carolina.

"Q This was the standard procedure you followed in all of the transactions which you had with Gulf up to this point; is that correct?

"A Yes, sir.

"Q Before June 17, 1966 did you have any arrangements with a company called United Porcelain Company?

"A Yes, sir.

"Q What kind of arrangements did you have with them in connection with these Gulf service stations?

"A Basically United Porcelain did the erection work for us in the New York -- Newark, New Jersey area.

"Q Had you had transactions with United Porcelain before June 1966 involving Gulf service stations?

"A I am sure we had.

"Q Do you know about when it was that you first retained United Porcelain in connection with this very job located at 2153 Eighth Avenue in Manhattan?

"A We wrote United Porcelain a purchase order dated June 20, 1966 to erect the material.

"Q That was the purchase order that you had with United Porcelain; is that correct?

"A Yes, sir.

"Q That is the last of the documents which is part of Plaintiffs' Exhibits 7 and 8 in evidence; is that right?

"A Yes, sir. That is the subcontract agreement with United Porcelain.

"Q Did you at that time advise United Porcelain of any special instructions in connection with the erection of this prefabricated overhang and the new tiles?

"A No, sir. The purchase order would be the information we furnished United Porcelain.

"Q Did you ever -- when I say 'you' I mean Beaman

Corporation in each instance, you understand.

Did Beaman Corporation ever advise United Porcelain Company that there was anything unsafe about the roofing or the coping of the roof?

"A Not to my knowledge.

"Q In this premises?

"A Not to my knowledge.

"Q Did you ever tell them that they were not permitted to work on the roof or use the roof for purposes of installing the overhang and the other material, the decorative materials?

"A No, sir, not to my knowledge.

"Q Did Gulf Oil Corporation ever instruct you to notify United Porcelain about any special safety precautions that they were to exercise in connection with this job?

"A Not that our files indicate.

"Q Did they ever tell Beaman Corporation that they were to instruct United Porcelain not to use the roof or the coping for purposes of this job?

"A No, sir.

"Q Following this purchase order of June 20, 1966 what was done in connection with this job?

"A Our files end here. We gave a contract to

United Porcelain to erect it. We billed Gulf when the erection was complete. We received our money and paid United Porcelain.

"Q Do you have the bill that you sent to Gulf?

"A I do not, sir, no.

"Q Do you know when that was sent out?

"A No, sir.

"Q Would that be in your files, sir?

"A No, sir.

"Q There was marked yesterday a bill dated June 17, 1966, which is part of Plaintiffs' Exhibit 6 in evidence.

"A Yes, sir. This would be a copy of our bill to Gulf.

"Q I can't read it, but maybe you can. Could you read it into the record what was contained on that bill?

"A I can't make out this work. I really can't make it out."

MR. DUBROWSKI: Your Honor, I don't know, with all this correspondence, all this information-- excuse me for not rising-- with all this information concerning what was on the bill, I don't think there is any relevance here. Just tell us what was done, which

has been repeated on for 24 pages already.

THE COURT: If it is in evidence I don't see what the witness' inability to read it--

MR. AUSUBEL: No, I am going to skip through that.

Go to page 31, line 4.

I said I would try to make it shorter. I know it's tough on you and it's tough on the jury, but it's pretty tough on me.

"Q How were these prefabricated overhangs attached to the front of the buildings?

"You say 'by brackets.' Could you give us a little more explanation of that?

"A The brackets are attached to the front of the building by means of what we call drive rivets.

"Q Drive rivets?

"A That is correct.

"Q In other words, you would screw these brackets into the front of the building.

"A We would drill a hole into the masonry and insert a drive rivet into the hole, and then the rivet is expanding by holding the bracket onto the building."

Now, there is a correction to that answer which reads:

"The rivet is expanded, thereby holding the bracket into the building."

THE COURT: In other words, the stenographer apparently didn't get the "thereby".

"Q Could you give us some idea of the size and strength of the rivets that you used to bracket, to attach the brackets to the wall?

"A No, I can't. I can tell you approximately, yes.

"They are approximately 1/4 inch in diameter and 1-3/4 inches long.

"Q When you are sent this transcript to execute would you check on the exact size and strength and dimensions of those rivets and fill it in if we leave a space for you?

"A Yes."

And the rider reads as follows:

"Size 1/4" diameter x 1-3/8" length. Material: 2117-T4 Aluminum alloy strength: Shear - 2010 lbs. - Tensile - 1065 lbs.

"Q You were asked about whether prior to this job and including this job, in connection with your transactions with Gulf wherein you were retained under this blanket policy arrangement, whether you had relied upon Gulf Corporation to have made inspections of the

building and to advise you if there was anything insecure about the building, and you had answered that you did indeed rely upon Gulf.

"Do you recall in substance giving that testimony both in direct examination as well as in cross examination?

"A Yes, I think so.

"Q These were Gulf stations; is that correct?

"A Yes, sir.

"Q In each instance?

"A Yes, sir.

"Q In each instance you had developed a practice over some years before this transaction; is that correct?

"A Yes, sir.

"Q With Gulf?

"A Yes, sir.

"Q Gulf made arrangements for the drawing of the plans and specifications; is that correct?

"A Plans and specifications were furnished to us by Gulf, yes, sir.

"Q You were requested to arrange to follow those plans and specifications as well as the purchase order; is that correct?

"A Yes, sir."

Line 19.

"Q In your practice with Gulf over the years that you have been doing business with Gulf, do I understand correctly that you would follow the plans and specifications and orders of Gulf in connection with whatever work was done; is that correct?"

The answer appears at page 34, line 13. I haven't gotten quite there.

"A Yes, I would.

"Q In connection with the safety of the building do I understand correctly that you would rely upon Gulf to have made whatever inspections were necessary to see to it that it was safe for either you or your subcontractor to work on the premises; is that correct, sir?

"A Yes."

MR. DUBROWSKI: The answer is, "Yes, I would."

MR. AUSUBEL: I have, "Yes."

Line 25.

MR. HAUT: Line 25.

"Q This was based upon a practice which you had with Gulf over a number of years and a number of service stations that were done before this one; is that correct?

"A Yes, sir.

"Q If there was some special condition of the building about which you were to be concerned with in connection with the performance of this work, do I understand correctly that you relied upon Gulf to advise you of any such special condition?

"A I would expect to be advised if there were unusual or unsafe conditions on a job, yes, sir.

"Q By Gulf?

"A I would like to be advised of this, I would expect to be advised, yes, sir.

"Q By Gulf?

"A Yes, sir."

Go to page 40, line 9.

"Q Would it be fair to say that United Porcelain would rely upon any instructions that you would give to them with respect to the performance of this job and that you in turn would rely upon any special instructions that would be given to you by Gulf in connection with this job?

"A Yes, sir."

Page 41, line 4.

"Q What business was United Porcelain engaged in, to your knowledge?

"A General contractors and porcelain enamel erectors.

"Q In connection with these jobs, were they retained for the purpose of erecting the enamel and the overhang?

"A Yes, sir.

"Q Were they retained to do anything about the roof of the building or the coping of the building or the wall of the building other than to put on the enamel or the overhang?

"A No, sir. They were retained to erect the overhang and the porcelain."

That is it, your Honor.

MR. FUREY: May I have a moment to look at this, your Honor. I may have a few questions.

MR. DUBROWSKI: Are you ready, sir?

Page 25, line 22.

"Q In connection with the prior jobs which you had with Gulf Oil Corporation in the New York-New Jersey area, where you used United Porcelain as a subcontractor, was the same procedure followed in substance as was followed in this case?

"A Yes, sir."

Page 26, line 11.

"Q Before any work of this kind is commenced or was commenced in this case, did you rely upon Gulf to get the necessary permits?

"A Yes, sir.

"Q To permit you to do the work?

"A Yes, sir.

"Q As I understand it then, you relied upon Gulf to get the necessary documents so that you could properly subcontract it out, the permits for the commencement of the work; is that right?

"A That is correct.

"Q And you relied upon Gulf for the security of the building, the roof and coping; is that correct?

"A Yes, sir.

"Q And you relied upon Gulf to have inspected the building before the job was begun so that it was safe to do the job; is that correct?

"A Yes, sir."

Page 30, sir, line 5.

"Q Did you have any conversation at all with United Porcelain as to inspection of the Gulf buildings for safety before they commenced their work on it?

"A Not to my knowledge.

"Q Or did you rely on United Porcelain to make

those inspections for their own men?"

The answer, sir, is on page 31.

MR. AUSUBEL: Your Honor, there were several objections raised by various counsel which speak for themselves, and I would ask your Honor to read the objections.

THE COURT: You make the objections now?

MR. AUSUBEL: Yes, I press the same objections that were then raised.

MR. HAUT: I join in the objection, your Honor.

MR. AUSUBEL: And I might say that at that time the attorney representing Beaman objected to that question.

THE COURT: Apparently he is not objecting so vociferously now.

MR. DUBROWSKI: I am not objecting now.

MR. AUSUBEL: At least two of us, then, retain the objection.

MR. HAUT: Your Honor, at the end of the deposition it became quite clear that the witness was testifying with respect to this question. I refer your Honor to the last two pages. That is page 42, sir, at the end.

THE COURT: You say 42 sheds light?

MR. HAUT: Sir, this issue came up at the end of page 42.

THE COURT: On what theory is it objected to? The only objection here is that it is already answered and that is not a very good objection.

MR. DUBROWSKI: This was my objection, or my associate's.

THE COURT: And the other objection to the form of the question. I don't see anything wrong with the form. What's the objection?

MR. FUREY: I don't have any objection, your Honor. I think it is perfectly proper.

MR. AUSUBEL: We objected to it, your Honor.

THE COURT: On what ground? On the form of the question, what's wrong with the form of the question?

MR. AUSUBEL: As to the prior question, if you read it in conjunction with this question, it seems to me it is objectionable on the grounds of form, and particularly in the light of what subsequently developed on page 42.

THE COURT: What subsequently developed

certainly qualifies it. I don't see any objection to it.

Overruled.

"Q Or did you rely on United Porcelain to make their own inspections for --"

MR. GOLDSTEIN: I lost you.

MR. DUBROWSKI: Page 30, line 9.

"Q Or did you rely on United Porcelain to make those inspections for their own men?

"A Yes, we would rely on United Porcelain to that extent. Yes, sir."

THE COURT: Why don't you read those questions as they refer to on page 42. Might as well do it now.

MR. HAUT: Your Honor, I was going to do that if he wasn't.

THE COURT: Might as well do it now. It relates to the same matter.

MR. DUBROWSKI: All right. Page 42, line 7.

"Q In the initial purchase order submitted to you by Gulf Oil Corporation was there any request made of you for any inspection at all of the building?

"A Not that I know of.

"Q In the purchase order which you sent to

United Porcelain Company on June 20, 1966 was there any request made there for any inspection of the premises either before or during the progress of the work?

"A No."

All right, gentelmen.

MR. AUSUBEL: No, that is not what we had in mind.

MR. HAUT: Your Honor, may I interject at that point. The question at the end of that page, "Mr. Spencer, you said that you--" that is on page 42, line 22.

"Mr. Spencer, you have said that you would expect and you would rely on Gulf to inspect the building and to advise you of any unsafe conditions. You have also said that you would expect United Porcelain before--"

MR. FUREY: Your Honor, I object to this. There is no answer.

MR. DUBROWSKI: There is no answer.

MR. HAUT: There is an answer. Excuse me, counsel, if you just bear with me.

MR. DUBROWSKI: I don't have one.

MR. HAUT: The answer is on page 44, line 2.

MR. DUBROWSKI: But there are two questions in between.

MR. FUREY: That is not an answer to the question.

MR. HAUT: That certainly is an answer to the question.

MR. DUBROWSKI: There are two questions in between.

THE COURT: Question is on 43, line 15?

MR. DUBROWSKI: There is a question there. There is another question on line 20.

THE COURT: What question are you reading?

MR.HAUT: Yes, sir. May I continue?

THE COURT: What question are you reading?

MR. HAUT: I was reading on page 42, line 22. I was going to read to the end of that question, skip to colloquy, and then go to line 15. I wasn't going to read the colloquy. I was going to read then from line 15.

THE COURT: That seems proper to me.

MR. HAUT: May I continue again the way I was proceeding, sir?

THE COURT: Yes.

MR. HAUT: "Mr. Spencer" --again--

"Mr. Spencer, you have said that you would expect and you would rely on Gulf to inspect the building and to advise you of any unsafe conditions. You have also

said that you would expect United Porcelain before they commence the work to inspect the building and see if there were any unsafe conditions. Is that correct"

Colloquy.

"Q You said you would rely upon Gulf to inspect the building and advise you of any unsafe conditions, right?

"A I thought this would be a reasonable expectation, yes, sir.

"Q You also said that you would expect United Porcelain and rely upon them to inspect the building for safe conditions.

"A I don't remember it."

MR. DUBROWSKI: Page 38, sir, line 2.

"Q The United Porcelain Company would be notified by you, would it not, of any special conditions or unsafe conditions which were reported to you by Gulf before the job would be commenced; is that correct?

"A If unsafe conditions were reported to us we would report it to United Porcelain."

One more question here.

Bear with me please a second.

Page 41, line 26.

"Q What did you bill Gulf Oil Corporation for this job?

"A $5,719.20 ."

Thank you.

MR. FUREY: Page 27, line 7.

"Q This paper included in Plaintiffs' Exhibit--" that became 7 and 8, I believe?

MR. DUBROWSKI: Yes.

"Q This paper included in Plaintiffs' Exhibits 7 and 8 called 'Instructions and Conditions,' is it part of your general contract, overall contract with Gulf?

"A Yes, sir.

"Q Did you yourself or anyone, to your knowledge, have any specific oral conversation with any representative of Gulf as to your reliance on their inspection of the buildings?

"A No, sir, not to my knowledge."

Page 28, line 4.

"Q When you say you relied upon Gulf to inspect the conditions for safety before the work was commenced, you are not referring to any specific written or oral agreement with Gulf?

"A No, sir, I am not."

Page 31, line 4.

"Q How were these prefabricated overhangs attached to the front of the buildings?

"You say 'by brackets.' Could you give us a little more explanation of that?

"A The brackets are attached to the front of the building by means of what we call rivets."

MR. AUSUBEL: Excuse me. I read that entire page, your Honor.

THE COURT: I think we have had this.

MR. FUREY: I am sorry, I neglected to check it off.

MR. FUREY: I have nothing further, your Honor.

MR. HAUT: One question, sir.

THE COURT: One question.

MR. HAUT: Page 37, line 17.

"Q You have been with the company for 16-odd years; is that right?

"A Yes, sir.

"Q Over these 16 years you became familiar with the arrangements and the practices between Beaman Corporation and Gulf in connection with the erection, the modernization of these various service stations, is that right?

"A Yes,sir."

Your Honor, may I read one question that has

already been read for the sake of continuity.

THE COURT: All right.

"Q United Porcelain Company would be notified by you, would it not, of any special conditions or unsafe conditions which were reported to you by Gulf before the job would be commenced, is that correct?

"A Unsafe conditions are reported to us, we would report it to United Porcelain.

"Q In connection with this very transaction involving 2153 Eighth Avenue in New York City, is there any record to indicate that Beaman Corporation had notified United Porcelain Corporation of any unsafe, dangerous or potentially unsafe or potentially dangerous condition in the premises in connection with this job?" And the answer is on the next page.

"A To my knowledge there is no such information on our files."

Thank you, sir.

THE COURT: Is that the end of this deposition?

MR.AUSUBEL: Yes.

THE COURT: I think we ought to have a short recess. In view of the fact that this is Friday, we are going to quit at 4:00. We'll make it very short, about a

five-minute recess.

Bear in mind the question I will ask you. Would you have any objection to being on call, so if my case, Monday-Tuesday case, can be compressed into Monday I can let you know Monday between 4:00 and 5:00 for sometime that is convenient to you and we will proceed on Tuesday. I want to know if that will be an inconvenience to any of you.

(Recess.)

(In open court, jury present.)

THE COURT: I understand from the clerk that you were all amenable to that suggestion. Then I will ask you, before you leave, to give him your telephone number where he can reach you.

THE CLERK: I have it.

THE COURT: You have them all. So he will call you in either event sometime that evening. And if it is Tuesday, we will meet Tuesday at 10:00. If it is Wednesday, we meet at 10:30. The reason for that is, I have got to go to the dentist at 9:00. So the clerk will call you in either event, because I hate to leave it if you don't hear --

JUROR NO. 4: Excuse me, your Honor. You

mentioned that we would get a call in the evening early, you said, or after 4:00 so we could know more exactly in a little time range there.

THE COURT: If you have any particular time you want to be called, you tell the clerk. It will be after 4:00. I can't undertake to do it before four because I won't know.

JUROR NO. 4: I understand

THE COURT: If you have any particular time, tell the clerk before you go.

MR. HAUT: Your Honor, we will be notified in our offices?

MR. ADELMAN: Either way?

THE COURT: Either way. As far as the lawyers are concerned, if you haven't heard by five, you call my chambers. I won't put any such burden on the jury.

MR. DUBROWSKI: May we have the phone number, your Honor?

THE COURT: I will give it to you afterwards.

MR. AUSUBEL: Your Honor, I propose to read the last and the shortest of the depositions, and I hope to cut it even shorter then its current length. This is the deposition of United Porcelain Company, by

Salvatore Caso, which was taken on June 23, 1970. His deposition begins at page 4, examination by Mr. Ausubel.

"Q What is your full name and home address, sir?

"A Salvatore J. Caso, 161 Anderson Road, Bernardsville, New Jersey."

Line 16.

"Q Are you affiliated in some capacity with United Porcelain Co., Inc.?

"A Yes, sir.

"Q Where are they located at, sir?

"A Route 22 in Union, New Jersey.

"Q What is the business of United Porcelain?

"A We are porcelain installers.

"Q Do you have anything to do with general contracting or demolition work in connection with structures?

"A No, sir.

"Q Strictly porcelain work?

"A Just strictly porcelain installers.

"Q How long has United Porcelain been in business?

"A Since 1960.

"Q During this past ten-year period have they been in that same business?

"A Yes, sir.

"Q What capacity are you in that company?

"A I am president.

"Q Are you an engineer of any kind?

"A No, sir.

"Q Does your firm carry engineers on its staff?

"A No, sir.

"Q In connection with your work do you have sheet metal workers in your employ?

"A Yes, sir.

"Q What kind of trades work for United Porcelain other than sheet metal?

"A Basically just sheet metal."

Line 25.

"Q. Is it fair to say that during the ten years that United Porcelain has been in this business that you get contracts or subcontracts solely to put on porcelain in connection with certain jobs; is that correct, sir?

"A Yes, sir.

"Q Then you dispatch sheet metal workers after you are hired to put on this porcelain; is that correct, sir?

"A Yes, sir.

"Q Is this essentially decorative work?

"A Yes, sir.

"Q In the year 1966 did you have in your employ two employees, James McLean and Joseph Linfante?

I am referring to United Porcelain, you understand.

"A Yes, sir.

"Q Were they experienced sheet metal workers?

"A Yes, sir.

"Q Had they been in your employ for some time before June 28, 1966?

"A I believe so.

"Q Did there come a time when United Porcelain was hired to do certain work at a Gulf Service Station located at 2153 Eighth Avenue in Manhattan?

"A Yes, sir.

"Q Was the first occasion that United Porcelain received any communication in connection with that job an order dated June 20, 1966, which is the last document, part of Plaintiffs' Exhibits 7 and 8 in evidence marked on June 19, 1970?

"A I believe so.

"Q So as I understand it then Beaman Corporation sent you this form dated June 20, 1966; is that correct, sir?

"A Yes, sir.

"Q Did you receive any other telephonic communication or written communication from either Beaman or Gulf Oil Corporation in connection with this job?

"A I know we hadn't received any from Gulf Oil Corporation. There possibly could have been a phone call from Beaman advising me maybe that the job was in hand and to be coming shortly.

"Q Other than perhaps that kind of telephone call from Beaman, did you receive any other communication?

"A Not to my knowledge.

"Q With respect to this order form of June 20, 1966, it is entitled 'Subcontractor Purchase Order,' is that correct, sir?

"A Yes.

"Q Is this a form of the Beaman Corporation?

"A Yes, sir.

"Q According to this form you were asked to erect a Gulf overhanging with certain dimensions and at a certain price; is that correct, sir?

"A Yes, sir.

"Q Was that an overhang that extended from the roof of the building at 2153 Eighth Avenue?

"A Yes, sir.

"Q Then there were other terms enumerated that were called for under this job, is that correct, sir?

"A Yes, sir.

"Q Did they put in the price of each one of these things, Beaman, when they sent you this order form?

"A Yes, sir.

"Q Then there was an item there, 'economy conversion.' What does that mean?

"A Instead of being a two-foot overhang this is a conversion that goes flat up against the building.

"Q What do you mean by economy in this connection?

"A It does not extend beyond the face of the building and does not contain a light fixture.

"Q Were you requested in this form or otherwise by Beaman Corporation to make any inspection of the roof or the coping of the roof of this building in connection with this job?

"A No, sir.

"Q Were you ever requested by Gulf Oil Corporation at any time before the work commenced on this job or during the course of the progress of the work to make any inspection of the roof or coping of this job?

"A No, sir.

"Q Prior to June 28, 1966, upon whom would you rely to determine whether the roof and coping of this building were secure for purposes of working on this job site?

"A Normally we would rely on Gulf to inspect the building.

"Q Mr. Caso, before June 28, 1966, did you or anybody on behalf of your corporation, to your knowledge, ever go up to make an inspection of the roof or coping of this structure to determine the strength or stability?

"A No, sir.

"Q Did anybody ever suggest to you that you would have to do that before your men could work at the job site?

"A No, sir.

"Q Subsequent to your receipt of this subcontract purchase order dated June 20, 1966, from the Beaman Corporation, did you in fact assign James McLean and Joseph Linfante to work on that building?

"A Yes, sir.

"Q Did their job entail in any way general contracting work of any kind?

"A No, sir.

"Q Do I understand that they were in essence to erect this Gulf overhang and perform this economy conversion and the erection of the new porcelain in accordance with the subcontract purchase order dated June 20, 1966?

"A Yes, sir.

"Q Do you recall about how long before June 28, 1966, United Porcelain sent McLean and Linfante to the job site?

"A Offhand, I don't remember the exact date. I would have to probably refer back to our time sheets.

"Q But it was sometime between June 20th and June 28th, 1966, that they first went to the job site, is that correct?

"A I would assume so.

"Q Had you done work for Beaman Corporation before this occasion?

"A Yes, sir.

"Q Had you done work for Beaman Corporation in connection with subcontract work of this type on Gulf Service Stations before this occasion?

"A Yes, sir.

"Q Was United Porcelain's job in connection

with this Gulf project labor exclusively?

"A Yes, sir.

"Q You didn't make the material?

"A No, sir.

"Q Beaman made the material?

"A Yes, sir."

MR. DUBROWSKI: Objection.

All right, I will withdraw it.

"Q At some time you learned that while Mr.--"

MR. AUSUBEL: Excuse me.

Page 12, line 3.

"Q At some time you learned that while Mr. McLean and Mr. Linfante were working on this job they had an accident?

"A Yes, sir."

Line 9.

"Q Were you there at the time of the accident?

"A No, sir.

"Q In connection with the work of Mr. McLean and Mr. Linfante as sheet metal workers, from the time they first went to work for you up until their accident on June 28, 1966, was their performance satisfactory to United Porcelain?

"A Yes, sir.

"Q Did they work regularly for United Porcelain?

"A Yes, sir.

"Q Before this accident was there, to your knowledge, did you observe anything physically wrong with Mr. McLean before this accident?

"A No, sir.

"Q Did you observe anything physically wrong with Mr. Linfante before this accident?

"A No, sir.

"Q Before this accident what did their work entail in terms of their bodies? What parts of their bodies would they have to use and what kind of duties did they have as sheet metal workers?

"A Basically they were working with their hands and required to walk up and down the ladder.

"Q Work on roofs?

"A Not necessarily on the roofs.

"Q They would work from time to time, go up on roofs?

"A Yes, sir.

"Q This is manual work essentially?

"A Yes, sir.

"Q Is that correct, sir?

"A Yes, sir.

"Q You have to carry weights in connection with this work?

"A Other than tools or the material itself?

"Q Well, tools and material.

"A And material itself.

"Q They would have to carry those?

"A Yes, sir.

"Q And they would have to carry ladders?

"A Yes, sir.

"Q Is that correct, sir?

"A Yes."

Now go to line 16, examination by Mr. Nix, the attorney for Gulf.

"Q You said that you employed them as experienced sheet metal workers, didn't you?

"A Yes, sir."

Go to page 15, line 2.

"Q Weren't you employing them as experienced sheet metal workers?

"A They come to us from the union hall as experienced sheet metal workers.

"Q Did you receive information from the union as to their experience in sheet metal work?

"A Yes, sir.

"Q Written information?

"A No, sir.

"Q Oral information?

"A Yes, sir.

"Q Did you make a record of that oral information?

"A No, sir.

"Q What was the oral information you received from the union as to their experience in sheet metal work?

"A That they had been trained in the field and had many years of experience and would be competent sheet metal workers for us.

"Q Did you learn how many years of experience they had?

"A No, sir.

"Q Why did you employ men experienced as sheet metal workers?

"A Because this particular work came under the jurisdiction of the sheet metal trades.

"Q What was the name of their union and its address?

"A Local 172 in Newark , New Jersey."

Now go to page 19, line 4.

"Q Would you fill in that information on this transcript in the space provided, what number of years they had been working for you before this accident occurred?

"A Yes, sir."

"McLean started June 1964. Linfante started October 1965."

"Q Could you estimate the number of times they had installed these prefabriacted overhangs on the gasoline station of the various oil companies?

"A Many.

"Q Which were made by Beaman?

"A Many times.

"Q Would it be 100 times, 150 times, 12 times? Could you give us an estimate anywhere in that range?

"A Offhand I would have no idea.

"Q Would you fill that in on this transcript when it is sent to you for execution?

"A We will try to."

And there was inserted on page 20:

"McLean about 75, Linfante about 25."

Now go to page 21, line 20.

"Q The actual supports for the overhang, then, had been completed, had been installed and completed,

underneath the overhang?

"A I believe so.

"Q All along the overhang; is that correct?

"A I believe so."

Page 24, line 3.

By Mr. Ausubel:

"Q I will ask you to add to the transcript the rate of pay on an hourly basis which was in effect for Mr.McLean and Mr. Linfante at the time of this accident, and each successive increase in rate of pay and when it went into effect from that time until the present time for sheet metal workers.

"A April 3, 1966 - $5.51 per hour.

"April 3, 1967 - $5.60 per hour.

"April 3, 1968 - $5.69 per hour.

"April 3, 1969 - $5.90 per hour.

"April 3, 1970 - $6.11 per hour."

That's all.

MR. HAUT: May I add one? Page 23, line 9.

"Q Who was the man in charge of that work there, who acted as the foreman or supervisor, if anyone?

"A Neither one. They are in the same capacity."

THE COURT: Anybody else?

MR. DUBROWSKI: Yes, your Honor, page 24,

line 15.

"Q Was there overtime work available for sheet metal workers at this time?

"A Normally we didn't work any overtime."

MR. FUREY: Page 20, line 8.

"Q When you say 'half completed' had the overhang been installed at that time?

"A A portion of it."

THE COURT: At what time was that referring to?

MR. FUREY: The previous question, your Honor, is:

"Q Do you know at what stage the installation of the overhang was at the time the accident occurred on June 28, 1966?

"A I would say about half completed."

Line 18.

"Q When you say a portion of it, do you mean the entire overhang had not been installed?

"A It had not been completed.

"Q The overhang then, the entire overhang had been partially installed?

"A Yes, sir.

"Q What portion of it remained to be completed?

"A I believe there were some light fixtures and the soffit overhang had to be installed.

"Q And the what?

"A The soffit.

"Q How do you spell soffit?

"A S-o-f-f-i-t.

"Q What is that?

"A That is the bottom portion of the overhang that closes off the structural members of it.

"Q What do you mean by 'closes off the structural members'?

"A The soffit is a decorative material that closes off the structural members of the overhang."

MR. HAUT: Can you continue?

MR. AUSUBEL: Can you continue with the next question and answer.

MR. DUBROWSKI: Continue with the answer.

MR. FUREY: Line 20?

MR. HAUT: No, 15 and 16, after soffit.

MR. AUSUBEL: "The soffit is a decorative material that closes off the structural members of the overhang."

THE COURT: He said that.

MR. FUREY: "It is not used for support."

"A It is not used for support and it is underneath

and as you look up it is finished."

Page 22, line 2.

"Q The only thing that remained then was the installation of the soffit, which is a decorative part underneath and the lighting?

"A Yes, sir.

"Q Do you know what part of that work they were doing at the time this accident occurred?

"A I believe they were installing the light fixtures.

"Q I believe you told us that part of the equipment was ladders?

"A Yes.

"Q They took ladders to the job with them?

"A Not necessarily.

"Q Or they used them as they found them at the station; is that what you mean?

"A Yes, sir, we would supply the ladders.

"Q What was the height of this station, gasoline station, if you know?

"A Approximately fifteen feet from grade.

"Q From the street level?

"A From the street level.

"Q What type of ladders did you supply?

"A We used eight-foot extension trestle.

"Q Would you put that description on the record?

"A The eight-foot extension trestle, it is an--"

MR. HAUT: "A" shape is the way the answer was.

MR. FUREY: It says "I". It should be "A".

MR. AUSUBEL: It was changed on the original.

THE COURT: Changed?

MR. AUSUBEL: Changed from "I" to "A".

"The eight-foot extension trestle, it is an "A"shape with an extension ladder up the center.

THE COURT: "A" is A, B-- the first letter of the alphabet?

MR. AUSUBEL: That's correct.

"Q You say the basic formation is something like an ordinary stepladder, is that right?

"A Yes, sir, with rungs on both sides.

"Q How many ladders did they take for this job?

"A Normally we bring three ladders to the job.

"Q Were they all--

"A An eight-foot extension trestle they are called.

"Q Were they all of thatsame type of ladder?

"A Yes, sir.

"Q That is composed of metal, I assume?

"A No, sir, they are wood."

MR. FUREY: That is all. Thank you.

THE COURT: Anything else, counsel?

MR. HAUT: One question, sir. Page 21, line 20.

"Q The actual supports for the overhang, then, had been completed, had been installed and completed, underneath the overhang?

"A I believe so.

"Q All along the overhang; is that correct?

"A I believe so. "

MR. HAUT: Thank you.

THE COURT: Who is your next witness?

MR. AUSUBEL: I was going to put one of the plaintiffs on, your Honor.

THE COURT: Why don't you use ten minutes in getting his background?

MR. AUSUBEL: Sure.

Mr. McLean.

J A M E S V. Mc L E A N , called as a witness on his own behalf, having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AUSUBEL:

Q Mr. McLean, I know you have a tendency to drop your voice. I wonder if you would try to keep your voice

up so all of us can hear you. Would you do that?

THE COURT: Take your lectern way back, and he will have a tendency to talk back there to you.

Q Will you do that, sir?

A Yes.

Q Try to keep your voice up.

Now, Mr. McLean, what is your date of birth?

A February 13, 1911.

Q And if my arithmetic is correct, back on June 28, 1966, you were then 55 years old, is that correct?

A That's correct.

Q Are you married?

A Yes.

Q What is your wife's name?

A Ethel.

Q I take it she is the lady that has been in Court here the last few days?

A That's correct.

Q Back at the time of this accident of June 28, 1966, did you live at home with your wife?

A Yes.

Q Did you have any children that lived at home then?

A Yes, four.

Q What was your occupation at that time?

A Sheet metal worker for the Sheet Metal Workers International Union, Local 22-- I mean 172.

Q At that time, were you working for United Porcelain Company?

A Yes.

Q Was this a regular job that you had with United Porcelain?

A Yes. Sheet metal.

Q When did you first go to work as a sheet metal worker?

A Oh, about 1950, May or something like that, 1950, I think.

Q And you had gone to work as a member of the union that you described?

A Yes, sir.

Q I take it you received some training in connection with your work?

A Yes, I did.

Q What kind of training did you receive, what kind of work did you have to do as a sheet metal worker?

A Well, we made signs and we first had to fabricate the materials in the shop.

Q Yes?

A They make them into signs.

Q Were you trained about putting materials onto buildings?

A Yes.

Q As I understand it, then, you had been a sheet metal worker for about 16 years before this accident, is that correct?

A Approximately that.

Q Who did you go to work for after you became a sheet metal worker?

A I went to work for Colonial Neon in North Bergen.

Q I see.

A New Jersey, that is.

Q What sort of work did you do for them as a sheet metal worker?

A Making signs.

Q About when was it that you went to work for United Porcelain?

A Oh, in 1964.

Q This was about two years before this accident?

A Yes.

Q You heard a Mr. Caso's testimony read. Did you

know Mr.Caso? Was he your boss?

A Yes. We were interviewed by him before we got the job.

Q And you were hired through the union hall?

A Yes.

THE COURT: What does that mean, the union sends men to the employer?

A Well, he called up for some men, and we were sent over there to his place. And he talked with us for awhile, and then he came and told us to come in a certain day to work.

THE COURT: He didn't have to take you if he didn't want you, is that it?

A Well, I guess that is the purpose of the interview, to see if we are satisfactory to him.

Q Incidentally, did you have much education of your own?

A Just regular school, no high school.

THE COURT: You say no high school?

A No high school.

THE COURT: You went through grammar school?

A Just grade school.

THE COURT: Fourth grade-- no, eighth grade.

A That was eighth grade.

Q And after that you went out to work, is that right?

A That's right.

Q You had been working up until the time of this accident, is that right?

A Correct.

Q In connection with your work as a sheet metal worker for United Porcelain, did they specialize in some kind of work, United Porcelain?

A Well, their job was mostly in the field of porcelain.

Q Mostly in the field of porcelain?

A Porcelain.

Q Did their job involve work in connection with service stations?

A That's what it was, all service stations.

Q All service stations.

A Yes.

THE COURT: They had nothing else except service stations; is that what you are saying?

A As far as I know. I never saw nothing but service stations, gasoline stations.

Q Before June 28, 1966, did you have occasion to work as a sheet metal worker for United Porcelain in

connection with Gulf Service Stations, the decorations, putting on new overhangs?

A Yes

Q And perimeter lighting?

A Yes.

Q Let's say before June 28, 1966, during the time you worked for United Porcelain, about how many jobs would you say you had done which involved service stations?

A Well, I thought of about, as they said before, around 75 would be pretty fair, because they averaged about one a week, like one every five days, and if it had more than two bays it made it a longer station, it would take a little longer, like 6 or 7 days.

Q When you are talking about two bays, you are referring to the usual bays of a service station?

A Yes.

Q Gasoline station, is that correct?

A That's correct.

Q In connection with these jobs that you had undertaken before June 28, 1966, were any of these jobs subcontracted out by Beaman Corporation.

MR. DUBROWSKI: Objection, your Honor, he may not know that.

THE COURT: Do you know where the work came from?

A Do I know where the work came from?

THE COURT: Yes. Where your boss got the work from.

A Well, we knew the material came in from Beaman's, but I don't know if it was actually anything going on, I guess it was.

THE COURT: You had worked on Beaman material before?

A Yes.

THE COURT: But you don't know how they contracted, how they got it?

A I wouldn't say that. I knew for sure.

Q You had nothing to do with the contractual arrangements between Beaman and United Porcelain, is that correct?

A No, I had nothing to do with that.

Q But you would get the order to do the job and then you would get the Beaman materials at the job site. Is that correct?

A That's correct.

THE COURT: Now, the question is: How many times before this episode did you work on Beaman material?

That is what he wants to know.

A All of the jobs we did were the same, from Beaman.

THE COURT: All on Beaman material?

A Yes.

Q Before June 28, 1966, what kind of materials did Beaman send to the job site which you worked with? Just describe it for us generally.

A Well, you would have your decking.

Q Yes?

A A couple of types of brackets.

Q Yes?

A And you would have a fascia.

Q Yes?

A Soffits, bolts, nuts, caulking compounds, and usually a piece of wood that sometimes would go in the front over the corner, where if you had a corner--two sides. It wouldn't be on a one-sided building. Just a straight run.

THE COURT: I guess this is a good time to stop.

Ladies and gentlemen, take up with the clerk if any of you have any preferences as to the hour to be called. It can't be before 4:00. And you will hear from

us one way or another. I will see you either at 10:00 o'clock on Tuesday or 10:30 on Wednesday, depending on what you hear from the clerk. In the meantime have a good weekend. Don't talk about this case or don't let anybody else talk to you about it.

(The jury left the courtroom.)

THE COURT: While I think of it, will you please correct the trial order, or not correct it but bring it up to date, to get life expectancy as of today, not as of whenever this accident happened. That is what is relevant to the jury's considerations.

MR. AUSUBEL: I have that.

THE COURT: That doesn't have to be done today.

Anything else, gentlemen?

MR. DUBROWSKI: Have a nice weekend, your Honor.

MR. BRILL: There was something, your Honor. I find that there is a notice in my file that I hadn't seen before, it is so voluminous, and I hadn't had contact with it, that we intended to serve notice that we intended to indicate our position with regard to the indemnification clause in the lease. I don't want to burden the Court with it at this time, but perhaps when we meet again I would like to note that for the record.

THE COURT: All right.

(An adjournment was taken.)

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JAMES V. MC LEAN, et al.
vs.
L.P.W. REALTY COMPANY, et al.

GULF OIL CORPORATION
vs.
PERMIAN CORPORATION, et al.

New York, February 13, 1974

10:45 a.m.

Trial resumed.

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(In open court; jury not present.)

THE COURT: We have one juror missing. We know he is on the way. He had a car break down.

I thought I would use this time to clear up any legal matters you might have.

Plaintiff made a motion for a mistrial for a mistrial on the basis that the defendant Gulf pointed out to the jury that he was not suing his employer and plaintiff implied that that statement suggested workmen's compensation and therefore it was erroneous.

I am not concerning myself with that notion, but if plaintiff has any cases which support any such proposition I would like to see them, because it is quite clear to me in my charge I have to make precisely that distinction, and the jury obviously comes with pre-

suppositions about an employer's liability, which is a question of liability without fault, and before they can intelligently consider this case the court has to make clear to them the difference that Gulf is not in this situation an employer and any preconceptions they may have about an employer's liability to its employees are not relevant to this case.

If you have any authority, I would like to see it.

MR. AUSUBEL: If your Honor will permit me this evening, it is certainly ample time in advance of the charges.

THE COURT: Of course. I don't expect you to have it now.

MR. ADELMAN: Your Honor, on the motion to dismiss that was made by the defendant L.P.W. on the basis of the plaintiffs' opening, which your Honor first granted, then reserved decision, and then Mr. Furey's statement that possibly there was a Dow situation which precluded the granting of that motion, I would like to submit a memorandum of law, and if your Honor wants argument I am ready to argue.

THE COURT: How long will the case be, the direct case?

rka3

MR. AUSUBEL: I expect to be concluded with my case -- I have a doctor I am putting on now out of turn this morning. I hope to be finished with my case either today or, at the latest, early tomorrow.

THE COURT: I would like the memorandum in the meantime.

MR. ADELMAN: Your Honor is going to reserve decision until at the end of the plaintiff's case?

THE COURT: Yes.

MR. AUSUBEL: Your Honor, I had premarked, to expedite the doctor's stay in the court, the hospital records and his x-rays. One of the hospital records, namely, the St. Francis Hospital record of Mr. Linfante, has a reference on the first sheet to the fact that there was insurance in the case. I have taken the liberty of photostating that first page, blocking out that reference, and I would ask that when I do offer it, and I can offer it now even in the absence of the jury --

THE COURT: Why don't we offer it now.

MR. AUSUBEL: I can make the offer of the various exhibits if you will permit me.

THE COURT: Go ahead.

MR. AUSUBEL: At this time I offer in evidence the hospital record of James McLean with the Harlem

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rka65

AFTERNOON SESSION

(2:20 p.m.)

(In open court; jury present.)

THE COURT: I would like to recall Mr. McLean.

J A M E S V. M c L E A N RECALLED.

DIRECT EXAMINATION CONTINUED

BY MR. AUSUBEL:

Q Mr. McLean, I believe you were on the stand 10 minutes or so before we recessed?

A Yes, that is right.

Q That was the night of the snow storm.

I think, if my memory serves me correctly, you had indicated you worked on about 75 of these jobs on service stations before this accident, is that correct, sir?

A Yes.

Q Did your work in any way involve the alteration or modification of copings or parapets?

A None whatsoever.

Q Had you ever done any of that kind of work during the time you worked for United Porcelain?

A No, I never did any alterations.

Q Then there came a time -- incidentally, the

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work that you did on these 75 prior occasions before this accident, was there a regular custom and practice for you to do your work in putting on these overhangs and perimeter lights?

A Yes.

Q What was the custom and practice that prevailed during the time you worked for United Porcelain before this accident? How would you do your work?

A You mean right from the beginning, from the beginning of the job?

Q Yes. Give us generally how you did your work, how you installed the overhang and the lights.

MR. DUBROWSKI: I will object to this. We are dealing with one particular thing, unless there is some connection with this building.

THE COURT: He has to prove the failure of contributory negligence.

MR. DUBROWSKI: On this job.

THE COURT: I assume he is going to show that his practice was so-and-so and he followed that practice in this case.

MR. AUSUBEL: That is it precisely, your Honor.

A When we arrived on the job we would take all

the material up on the roof, pass it all up to get it out of the way of the station so they could operate. Those were our instructions, not to interfere with the operation of the gas station.

THE COURT: From whom were the instructions?

THE WITNESS: From United Porcelain, our boss.

A Then we would send the lights up that way too. Everything went up on the roof.

Q These lights we are talking about, are they fairly uniform in size and weight?

A Yes. They are about 60, 70 pounds, I would say.

Q About how long are they?

A About eight foot.

Q Do you install these lights or did you? Was it your custom and practice to install lights by use of A ladders before this accident?

A No, never.

Q Why?

MR. FURLEY: Objection.

MR. AUSUBEL: Withdrawn.

Q Had you received any instructions in connection with that aspect of your work?

A Yes, it would be too dangerous to go up the

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ladder on an extension.

MR. FUREY: Objection. Move to strike it out.

THE COURT: Did anybody tell you how to do it?

THE WITNESS: Yes, always from the roof.

BY MR. AUSUBEL:

Q Who told you that?

A The boss, United Porcelain.

Q On the jobs that you had done, the 75 jobs before this, had you ever used A ladders to put up perimeter lights on an overhang?

A Never.

Q You said you would put it on the roof. Then what would you do after you put the materials on the roof? Were there any plans that came with the materials?

A Yes, the lighting plans came with the job. Then we would start putting up the brackets. That would be our next job, but that would be done from the street side on A ladders with a plank between, and drilling the wall brackets in first, then the triangle bracket which would hold the decking and the fascia. The fascia would be for the light.

THE COURT: You haven't put any lights up yet?

THE WITNESS: No.

THE COURT: First you have to put everything on the roof?

THE WITNESS: Yes.

THE COURT: Then the next job is to put on the brackets?

THE WITNESS: The wall brackets. But as we put on the wall brackets, whatever the length of our plank is, we would put one here and one 40 inches or so apart. Then we would go back and put the other bracket on that goes out from there.

The wall bracket is this way, and the other bracket goes outward that way, toward the street, and that is where the decking, after awhile, would go on top.

Q You indicated two brackets. The first bracket, I think you indicated, ran vertically with the building?

A Yes.

Q Is this a prefabricated material?

A Yes.

Q Sent by Beaman?

A By Beaman.

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Q The other bracket has a triangular form or shape?

A Yes.

Q What does the function of that triangular bracket serve?

A That holds up the decking and the lighting and everything that is on top there, whatever is on top there.

Q How doyou put both of those brackets into the wall or roof of the building?

A The wall bracket goes in with about 10 inch and a half rivets, quarter inch in diameter. The holes are predrilled in the wall bracket and we just go through that hole into the building. In this case it was brick.

Then we drilled through with a carballoy bit to a depth of an inch and a half; then we insert the rivet in the hole and strike it with a hammer, and the pin would expand in back and that would hold the bracket on. That is for the wall bracket.

The triangular bracket would go on to that bracket with about six rivets.

Q Do you follow the plan that is given to you --

MR. DUBROWSKI: Objection. It is lead-

ing and suggestive. I don't recall he said he got a plan from Beaman, just as to the lights.

MR. AUSUBEL: That is what I am referring to.

MR. DUBROWSKI: Withdraw the objection.

A Only the lighting plan I know of and the material list.

Q Sir?

A The material list of the amount of material and the lighting plan.

THE COURT: The Beaman plan said nothing about wall brackets, is that the point?

THE WITNESS: It's on the material list, how many brackets and the distance between them we already know is 40 inches or so.

Q When you put in that triangular bracket, after that you say you put on the decking, is that correct?

A There is another piece that goes against the back part of that bracket, there is another angle that goes on there and that will support some of the decking later on. That is toward the roof side, by the coping.

Q Before this had you been accustomed to working on copings and roofs putting on these overhangs

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and perimeter lights?

A Yes.

Q After you put the decking on I understand you put the lights on?

A Yes. When we got finished with the decking and the riveting of the decking into the angles underneath to make it steady, then we are ready for the lighting, which is the last part of it.

Q What is the decking?

A That would be like a roof or anything that goes along to keep the rain -- all the brackets that we put outward like that would be spaced. You could look right up and see the sky, so by putting this decking, about 48 inches or so wide, they go into this fascia and come back over the coping and the rain, snow or whatever, it's at a little angle, then it would go down on the roof and that is it.

Q When you put on the light what was the custom and practice that prevailed before this accident during the 75 jobs that you did? From what side did you put on the lighting and from what side --

A From the roof side. We would always start from the roof, put our light out there along there, put our piece of wood down, part way out, maybe 15 inches or

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so. In other words, just to make it comfortable for ourselves to distribute our weight.

Q And you worked with a partner in connection with the job?

A Yes. In this case it was Mr. Linfante?

Q Had you worked with Mr. Linfante before this?

A Yes, quite a while. About 25 jobs.

THE COURT: I take it you have no pictures of this insulation?

MR. AUSUBEL: I will in due course come to it.

Q In connection with your work you mentioned that you were given A ladders; do you remember that?

A Yes.

Q Describe for us the ladders that you were given to work with?

A What we call them are A ladders. They fold up together and you can spread them out quite wide, maybe six, eight foot on the bottom; then they go up this way with a center piece that you could rise about six foot above that.

Q What was the height of the underlying ladder?

A About eight foot, I would say.

Q There came a time when you were working at

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a job located at the corner of 116th Street and Eighth Avenue in Manhattan, a Gulf station; do you remember that?

A Yes, sir.

Q When were you assigned to work at that station?

A I believe it was June 24, 1966.

Q That would be about four days before this accident?

A Yes.

Q Who was assigned to work with you?

A Mr. Linfante.

Q Were either one of you the foreman of the other?

A No.

Q Had you gotten any instructions before you went on this job?

A No.

Q You followed the usual practices?

A It was just a regular job. From one job to another.

Q When you came to the job site on June 24th, just tell us what you and Mr. Linfante did?

A On the 24th?

Q Yes, the first day you were down there.

A We arrived there, parked our car, went into the station, opened up the carton. This is usual where the instruction is in a carton where they had a few items for the roof that we put up there.

I find this paper with a sheet telling me the amount of materials that you had to have and the lighting plan, and then we put all the stuff on the roof by putting a ladder up, extending it and folding it together and laying it up against the roof of the building.

Q At that time was there any overhang on the building?

A None. Then we would bring the stuff out to the ladder and one would go on the roof and the other would stay down and tie this stuff and send it up.

THE COURT: You pulled it up on a rope?

THE WITNESS: Yes, and laid it against a ladder at some times to slide it up, using it as a sliding pond, taking the lights, carried them partly up and hand them to the man on the roof because you couldn't send them up on a rope, so we carry them part way up and hand it over; then he had taken it and laid it some place on the roof.

Q I think you indicated that weighed about 60,

rka76 McLean-direct 385

70 pounds.

A Yes.

Q What was its length?

A About 80 foot.

Q These with no lights were going in?

A Yes.

THE COURT: Neon lights?

THE WITNESS: Fluorescent.

Q About this accident, had you been given any instructions to make structural tests or inspections of the parapet or copings of roofs you worked on?

A No, sir.

Q Are you an engineer at all by profession or trade?

A No.

Q After you did this, put the materials on the roof -- by the way, were these Beaman materials?

A Yes, all material was supplied by Beaman.

Q And had been delivered to the job site before you got there.

A Yes. It was always on the job when we arrived.

Q Where were they on the job site when you got there on June 24th?

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A All inside the station, in between the base, the car base.

Q After you put the materials up on the roof tell us what you did during the succeeding three days up until just before the time of this accident? I don't mean day by day, but just generally what you did.

A We set up our ladders, our planks, set up the drills, hooked up to the electric power in the station, and we went up and started to put the wall brackets on. From there we would put the angle brackets on to the water brackets and then proceed with the long angle that would go along the back part of the building. That would go from one bracket to the other. Then after that we would put the fascia on.

THE COURT: What is the fascia?

THE WITNESS: That is the front part. It's about an eight-inch section, about eight inches high in different lengths. They cut the contents together with the length of the building, and we put those up. They were drilled through by 1/4-inch x 1-inch bolts and nuts until we got all the fascia up; then we would start in with the decking and after we got the decking we would put the rivets in through the decking, through the brackets to hold the decking down and hold

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it in place, then the lighting would be the last.

Q Before you get to the lighting, when you put in the decking, is that sometimes referred to as the overhang.

A The whole thing is the overhang. The name of the job was putting an overhang in.

Q Is your work exclusively putting in this sheet metal aspect of it, the decking, the overhang, the lights and the bracket you described?

A Yes, it was all metal and that was our job.

Q Did you have anything to do with putting on the enamel on the side of the building?

A Not on this job.

Q When you put in the overhang, as I call it, or decking, as you call it, where was it with respect to the top of the roof of the building? And I am referring to the overhang with respect to the parapet or the coping. Where was the parapet with respect to the roof of the building?

A It was a little behind the coping so it would be drained off.

Q When you put in this overhang -- first, when you say a coping what do you mean?

A It's a concrete slab on the top of the outside

part of the building, a perimeter which is about 12 inches wide and three inches thick. It could be four foot long too, something like that.

Q On this particular building what was the composition of the coping?

A It is concrete.

Q Beneath the concrete, what is underneath?

A Brick.

Q Does it have a name? I heard the name parapet.

A The parapet is from the roof up.

In other words, if this was the roof and this was the top of -- what do you call it -- where we were working, where the coping would be, this would be the parapet and this was a difference and it could also be 10 foot high in some buildings, and this was about three foot, I think.

Q When you put in the angle iron, the triangular bracket, where did you put it in with respect to the top of the wall?

A That would be slightly above the top.

THE COURT: I don't want to try your case for you, but if there is a picture would it be better if you got the picture identified so we would be looking at

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it.

MR. AUSUBEL: I think your Honor will understand when I get to that point why I can't at this point offer the photographs, but these are all post-accident and I don't want to distort the chronology of the testimony.

Q After you put in the overhang you said you are now ready to put in the lights?

A Yes.

Q On this particular job, by the time you had your accident on June 28, 1966 had you already completed putting in the various brackets that you described as well as this overhang?

A Everything was in except the lights when I had the accident.

Q Had you followed the same practices and procedures in putting in these materials as you had done on the 75 prior jobs?

A Exactly the same.

Q Had you ever had any trouble on any prior job when you put in these materialsd that way?

A Never.

Q What time did you have your accident on June 38, 1966?

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A I believe it was about 2:30 in the afternoon.

Q You tell me in your own words just what you were doing just before and at the time of the accident on the afternoon of June 28, 1966.

A My partner and I, Linfante, we put the light where it goes out on a decking part; then we picked it up and started to put it over the top like that. As we went down to pull it up like that, it just fell down and the roof caved in and we went down with it.

THE COURT: The roof didn't cave in, the overhang caved in. You were on the overhang.

THE WITNESS: We were partly on the overhang. Our knees were approximately half way, so that our weight is back here and just by leaning up forward you pick up the light on each end and you just pull it up, and that is when we fell.

BY MR. AUSUBEL:

Q You mentioned the roof caved in.

MR. FUREY: Objection. The roof didn't cave in.

THE COURT: Is that what he said?

MR. FUREY: Is he amending his pretrial order?

I object to it.

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THE COURT: Let me see what the pretrial order said.

MR. ADELMAN: In answer to your Honor's suggestion, he said the overhang.

THE COURT: That was my suggestion and he didn't accept it.

How long was the overhang?

THE WITNESS: The width or the length?

THE COURT: The width?

THE WITNESS: The face of the building out, it would be about 30 inches from the face of the building to the street side.

A What was the question?

Q You said the roof caved in and I wanted to know what part of the roof you say caved in.

THE COURT: Let me see the pretrial record.

Describe it in your own way.

MR. HAUT: May I ask the witness to keep his voice up.

Q What part of the roof caved in?

A The coping.

Q After you fell where did you find yourself?

A On top of an ice machine, I think you call it.

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Q How high above the street level was the top of the roof that you were working on before it caved in?

A From the street?

Q Yes.

A About 15 foot, something like that.

Q How far had you fallen from the roof to the top of the ice machine?

A About 10 foot, something like that.

Q After you fell did you look up to see where you were working?

A Yes.

Q What did you see?

A I saw the decking at an angle like this (indicating).

THE COURT: Forty-five degrees?

THE WITNESS: Something like that, and the coping was down from that part out toward the end of the building.

THE COURT: The coping is a concrete slab?

THE WITNESS: They are put in in sections on the top of the brick to finish it off and decorative -- I don't know what.

Q I will show you a series of photographs --

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THE COURT: You say one of the slabs of concrete was off?

THE WITNESS: From there on they were out.

THE COURT: Were they hanging?

THE WITNESS: They had gone off that part of the parapet?

Q I will show you a series of photographs, sir, and ask you whether these photographs fairly and accurately, this group, represent the condition of that area of the coping as well as the adjoining area --

THE COURT: You might as well get them individually marked for identification before you start showing them to him.

(Plaintiffs' Exhibits 14A through 14H were marked for identification.)

Q I am going to show you these photographs, 14A through H inclusive, and ask you if these photographs fairly and accurately represent the gas station as it appeared after this accident, demonstrating the overhang, the coping that was missing as well as the adjoining coping and overhang.

MR. BRILL: I think by your question you are referring to the time that he saw it, immediately follow-

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ing the accident?

MR. AUSUBEL: Yes.

I should amend that because some of the photographs show a portion of the overhang that had been removed.

Maybe I better do it seriatim.

A This was removed --

THE COURT: You can only tell us what you saw.

A This was removed.

Q Maybe I better take it separately, your Honor.

Q Does this photograph, Exhibit 14H, fairly and accurately portray the overhang as it was after the accident with the missing coping on that part of the building?

A Yes. As far as I remember it, that's correct.

MR. AUSUBEL: I offer 14H in evidence.

MR. FUREY: Objection. The witness couldn't identify it. He said as near as he can recollect.

THE COURT: That is all he can say.

MR. FUREY: May I have a voir dire.

THE COURT: Yes.

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VOIR DIRE EXAMINATION

BY MR. FUREY:

Q Mr. McLean, after you fell did you get up and take a walk around and look at the wall?

A No.

Q What did you do? Did you go directly to the hospital?

A They took me to the hospital a little later on. I was laying on that machine a while. They took me off in a basket.

Q From where you were lying on top of this machine were you able to see all the areas depicted in these photographs?

A I was able to see the roof.

Q Were you able to see anything else?

A What do you mean?

Q Were you able to see anything else than de-icted in those photographs besides the roof?

A I saw the deck facing down and I saw the coping missing.

Q Were you there when the United Porcelain people --

MR. AUSUBEL: Your Honor, I think this is beyond the scope of voir dire.

THE COURT: Yes. The question is whether he recollects this picture.

Q Did you see the wall with the overhang missing while you were lying there on the machine?

A I saw the coping missing.

Q Did you see the overhang missing?

A The overhang wasn't missing; it was down.

THE COURT: It was hanging like in this picture?

THE WITNESS: Yes.

MR. FUREY: There are other pictures.

THE COURT: But he is offering the picture.

Is there any other objection?

MR. DUBROWSKI: Let me see the picture so there won't be a mistake.

No objection.

THE COURT: Received.

(Plaintiff's Exhibit 14H was received in evidence.)

MR. AUSUBEL: If your Honor pleases, at this point could I distribute this photograph amongst the jurors so they could follow it a little more clearly, perhaps.

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THE COURT: Yes, surely.

You said there was coping. In relation to that picture, where had the coping been.

THE WITNESS: On the top of the parapet, along the facing of the building.

THE COURT: There had been a concrete slab?

THE WITNESS: Slabs. It's not one piece all the way to the end. It's put up in sections. When the builder puts it up he puts three, four feet.

THE COURT: Did these concrete slabs have any structural function?

THE WITNESS: I guess they are weighted down to stay on the building some way.

MR. AUSUBEL: I think I could help out with these next three photographs.

THE COURT: Go ahead.

DIRECT EXAMINATION CONTINUED

BY MR. AUSUBEL:

Q I will show you Exhibits 14D, F and G and ask you whether these photographs fairly and accurately represent the coping that remained on the building after the fall of the remaining coping and the overhang.

A Yes, that is it.